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Supreme Court of the United States

OCTOBER TERM, 1963.

Nos. 1049

[Consolidated Actions]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

OLGA ZDANOK, *et al.*, *Respondents.*

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

FRANK T. ALEXANDER, *et al.*, *Respondents.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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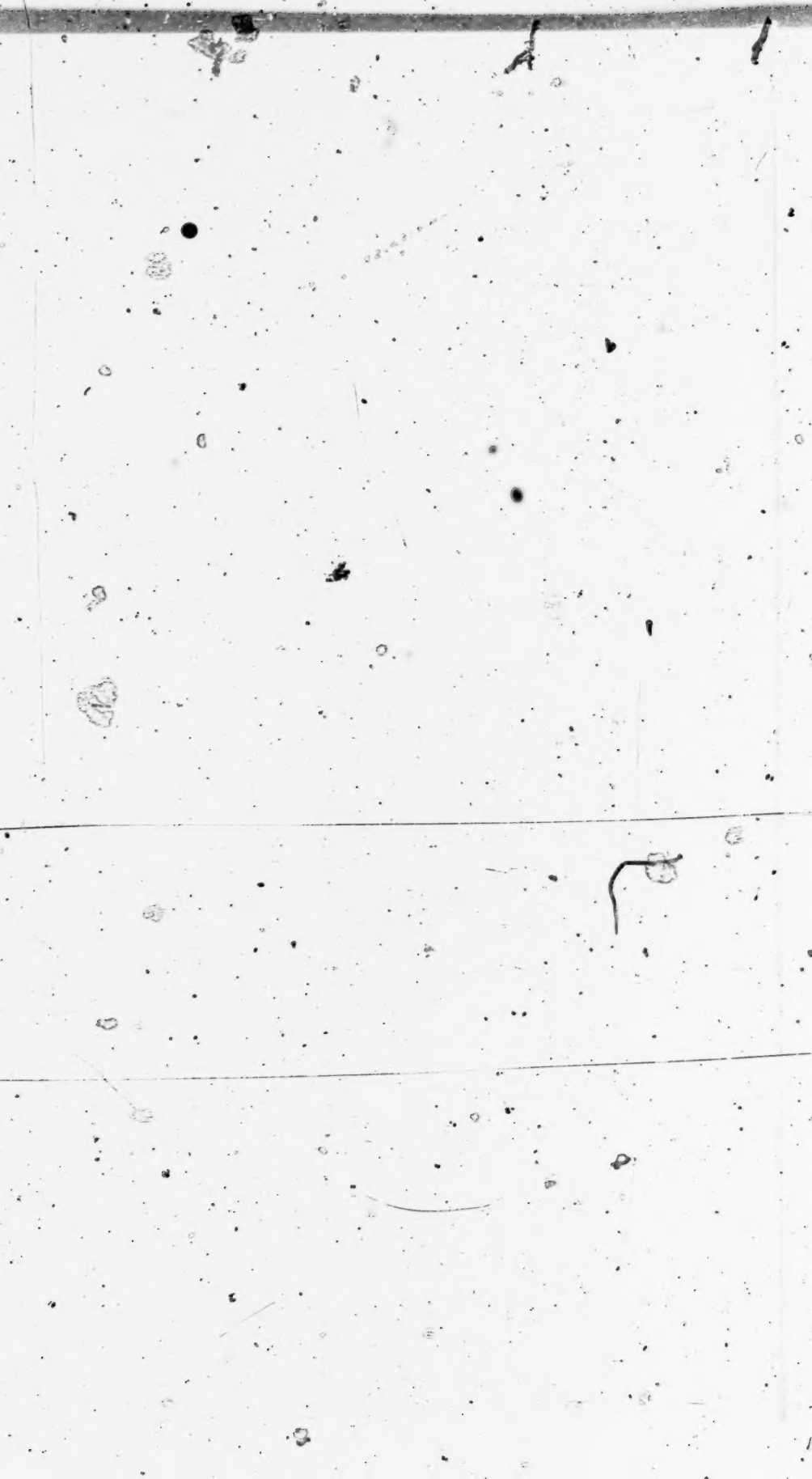

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Supreme Court of the United States

OCTOBER TERM, 1963.

Nos.

[Consolidated Actions]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, *et al.*,

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

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against

FRANK T. ALEXANDER, *et al.*,

Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, The Glidden Company, prays that writs of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgments entered herein on January 29, 1964.

Opinions Below.

The opinion and judgment of the United States District Court, Southern District of New York, in the consolidated cases is reported at 216 F. Supp. 476 and appears at page A-1 of the appendix attached hereto. The opinion of the Court of Appeals is reported at 327 F. 2d 944 and appears at page A-14 of the appendix. The prior opinion of the Court of Appeals in *Zdanok, et al.* v. *The Glidden Co.* is reported at 288 F. 2d 99 and appears at page A-37 of the appendix.

Jurisdiction.

The judgments of the Court of Appeals for the Second Circuit sought to be reviewed in the consolidated cases were entered on January 29, 1964. (See pages A-51, A-52 of the appendix) The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

(1) Whether, as a matter of federal substantive law, the recognition clause of a collective bargaining agreement is merely *descriptio personae*, thereby permitting unlimited extension of the seniority provisions of the agreement to

plants other than that for which the agreement was negotiated.

(2) Whether, as a matter of federal substantive law, the seniority provisions of a collective bargaining agreement confer "vested rights" to employment which survive good-faith termination of the agreement and good-faith closing of the plant for which the agreement was negotiated.

(3) Whether, as a matter of federal substantive law, a judgment in one suit may be asserted as a conclusive determination of an employer's liability under a collective bargaining agreement in successive actions by similarly situated plaintiffs.

(4) Whether this Court's intervening decision in *Smith v. Evening News Ass'n*, 371 U. S. 195 (1962), holding that federal law must be applied in actions by individual employees against employers for breach of collective bargaining agreements, was sufficient to make inapplicable an estoppel by a prior judgment based upon state contract law.[1]

Statutes Involved.

The pertinent provisions of the Labor Management Relations Act, 1947, 29 U. S. C. 141, *et seq.*, appear at page A-52 of the appendix.

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[1] Questions 3 and 4 are presented only in the *Alexander* case. Considered independently, the *Alexander* case does not consider the merits of the Court of Appeals' construction of the collective bargaining agreement. Of course, if the judgment of the Court of Appeals in *Zdanok* is reviewed by this Court (Questions 1 and 2) and found to be erroneous, the *Alexander* judgment, being based upon the conclusive effect of the Court of Appeals' prior *Zdanok* decision, must also fall. At this time, the *Alexander* case presents only the question of whether the Court of Appeals made proper application of the doctrine of collateral estoppel as a matter of federal law.

Statement of the Cases.

These two actions were commenced by respondents, 162 former employees of petitioner, for damages resulting from petitioner's alleged breach of a collective bargaining agreement. Respondents claimed that petitioner breached the seniority provisions of the agreement in failing, upon the termination of production facilities at its plant in Elmhurst, New York, at the expiration of the agreement, to offer respondents employment with seniority at a new plant opened by petitioner at Bethlehem, Pennsylvania.

A. Prior Proceedings.

The first case, *Zdanok, et al.* v. *The Glidden Co.*, involves five plaintiffs and was tried partially before the district court in 1960 on issues of liability. A judgment of that court dismissing respondents' complaint (185 F. Supp. 441), was reversed by the Court of Appeals, Judge Madden holding for a divided court that, under New York contract law, the respondents had acquired "vested rights" in their seniority which survived good-faith termination of the bargaining agreement and extended to the petitioner's new Bethlehem plant (288 F. 2d 99).

This Court thereafter granted certiorari on the limited question of whether participation of a judge of the Court of Claims vitiated the judgment of the Court of Appeals (368 U. S. 814). This Court, noting that the Court of Appeals had determined "a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants," affirmed the Court of Appeals' decision on the limited jurisdictional issue presented (370 U. S. 530, 537, *reh. denied*, 371 U. S. 854 (1962)).

The second action, *Alexander, et al.* v. *The Glidden Co.* involves 157 plaintiffs and was filed in the District Court on

June 26, 1962, just one day after this Court affirmed the judgment of the Second Circuit in *Zdanok*.[2] The *Alexander* case was consolidated with *Zdanok* upon remand of that case to the district court "because of convenience and the existence of common questions of law and fact" (R. 85).

On January 28, 1963, the consolidated cases came on for trial in the district court and evidence was presented concerning matters bearing on interpretation of the collective bargaining agreement. This represented the first evidence offered in these cases concerning the interpretation of the agreement by the contracting parties.[3]

At the close of respondents' evidence, petitioner moved to dismiss the complaints in each action on the ground that this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962) required application of federal substantive law in these actions and that the issue of its liability was no longer controlled by the Second Circuit's prior *Zdanok* decision inasmuch as that court had erro-

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[2] The *Alexander* case was originally filed in the New York Supreme Court, New York County, in 1958. Additional parties plaintiff were added by counsel for respondents right up to and after the time of the trial of the consolidated actions in the district court in 1963 (pages 776, 1014, 1150 of record from United States District Court Southern District).

[3] This evidence, admitted without objection and after respondents themselves had presented evidence in both cases, showed that respondents' bargaining representative, Local 852, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, claimed only the right *to negotiate* with defendant on severance pay and the transfer of willing employees to Bethlehem. The union did not claim any right on behalf of the employees to transfer to the new plant and, in fact, *acknowledged that the plaintiffs had no such right under the bargaining agreement* (R. 107-108, 136-138). This and other evidence led the district court to conclude that "the parties entertained no expectations that the employees' rights would survive removal of the Elmhurst plant" (page A-8 of appendix), and Chief Judge Lumbard to agree on appeal that it was "clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement" (page A-36 of appendix).

neously applied New York contract law in resolution of the issues in that case (pages 832 to 845, of Record from United States District Court, Southern District). This motion was renewed at the close of petitioner's evidence, at which point petitioner maintained that under applicable federal law and the evidence presented concerning interpretation of the bargaining agreement, petitioner was entitled to judgment in both cases (pages 988 to 1004 of Record from United States District Court, Southern District).

B. Decision Of The District Court.

Although the district court specifically found that the contracting parties "entertained no expectation" that respondents' seniority would survive termination of the agreement, the court considered itself bound by the Court of Appeals interpretation of the bargaining agreement on the prior appeal of the *Zdanok* case and entered judgment for plaintiffs on all issues of liability in each case (pages A-8, A-13 of appendix). The district court was of the opinion that the orders and judgments involved controlling questions of law as to which there was substantial ground for difference of opinion and promptly certified the consolidated cases for an interlocutory appeal pursuant to 28 U. S. C. §1292(b) to the Court of Appeals (pages A-10, A-11 of appendix).

C. Decision Of The Court of Appeals.

(1) The *Zdanok* Case.

In *Zdanok*, the Court of Appeals, recognizing that the contract must be construed according to federal law under this Court's intervening *Smith* decision, adopted as federal law on this appeal its prior decision in the *Zdanok* case. Conceding that its earlier decision, when adopted as federal law, was in direct conflict with a recent decision of the Sixth Circuit, the Court of Appeals nevertheless declined to change its prior decision under the "law of the case"

doctrine since the conflict did not mean "that the construction previously given by the majority in this Court was wrong" (pages A-24, A-25, A-26 of appendix).

(2) The *Alexander* Case.

The Court of Appeals gave separate attention to *Alexander* but held that petitioner should have been precluded by the District Court under the doctrine of collateral estoppel from contesting liability in this case in 1963. Excluding from consideration all evidence offered by petitioner in *Alexander* upon trial of that action in the District Court, the Court of Appeals concluded that the cases were the same, and that the "law of the case" established on the prior appeal of *Zdanok* could be extended to cover the *Alexander* action also. The Court of Appeals therefore affirmed the judgment of the District Court notwithstanding the change in controlling law announced by this Court's intervening *Smith* decision and despite the fact that none of the *Alexander* plaintiffs were parties to the earlier *Zdanok* case, several plaintiffs being added right up to and after the time of trial in 1963 (pages 776, 1014, 1150 of Record from the United States District Court, Southern District).[4]

Reasons for Granting the Writ in the *Zdanok* Case.

The original *Zdanok decision* (pages A-37 to A-48 of appendix) rested on two basic propositions; namely, (a) that description of the bargaining unit in terms of geographical location in this agreement was *descriptio per-*

[4] Chief Judge Lumbard, noting that it was "clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement," reluctantly concurred in the "law of the case" and collateral estoppel affirmance of the district court judgments, even though the result reached was "completely at variance with the intention of the parties" (page A-36 of appendix).

sonae, thereby permitting respondents' seniority to extend to another location, and (b) that the seniority provisions of the agreement conferred "vested rights" on these respondents which survived termination of the agreement. These propositions, now adopted by the court below as federal substantive law, run contrary to numerous decisions of other federal courts and of the NLRB involving the administration and enforcement of collective bargaining agreements.

A. As A Matter Of Federal Substantive Law Description Of A Bargaining Unit In Terms of Geographical Location In A Collective Bargaining Agreement is Not Merely *"Descriptio Personae"* But Defines And Limits The Operative Geographical Scope Of The Agreement.

1. The Holding of the Court of Appeals to the Contrary is in Direct Conflict with a Recent Decision of the United States Court of Appeals for the Sixth Circuit.

The decision of the Court of Appeals in the *Zdanok* case is directly in conflict with the decision of the Sixth Circuit Court of Appeals in *Oddie* v. *Ross Gear & Tool Co., Inc.*, 305 F. 2d 143 (1962), *cert. denied*, 371 U. S. 941 (1962).

The Court of Appeals, while recognizing, as urged by petitioner, that the construction of the contract in question must be determined by federal law, adopted as federal law, that court's prior decision in *Zdanok, et al.* v. *The Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *aff'd on limited grounds*, 370 U. S. 530, *reh. denied*, 371 U. S. 854 (1952). That prior decision, as stated by Mr. Justice Harlan of this Court, was based upon New York contract law and not federal substantive law (370 U. S. at 537). Consequently, the conflict did not arise until that prior holding was adopted by the court below in the instant cases as federal substantive law.

The conflict was conceded in the opinion by Judge Friendly in the Court of Appeals when he stated that *Oddie v. Ross Gear & Tool Co., Inc., supra,* was "not fairly" distinguishable from the instant cases "despite the Sixth Circuit's politeness in calling the Glidden agreement 'materially different'" (page A-25 of appendix). Later in the opinion, Judge Friendly, in comparing the *Oddie* decision with the prior *Zdanok* decision, describes the *Oddie* decision as the "contrary one of the Sixth Circuit"[5] (page A-26 of appendix).

The Court of Appeals in the first *Zdanok* decision, now adopted as federal substantive law, expressly held that the recognition clause of the agreement was "*descriptio personae*" and therefore did not define or restrict the geographical scope of the agreement or limit the seniority provisions thereof to the plant for which the agreement was negotiated. In *Oddie,* however, the Sixth Circuit expressly held as a matter of federal substantive law that the recognition clause of a collective bargaining agreement is not merely *desriptio personae,* but serves to define the geographical scope of the agreement and to limit the seniority provisions to the plant for which the agreement is negotiated.

The conflict cannot be avoided by any comparison of the recognition clauses in the two contracts construed by these courts. Despite the "politeness" of the Sixth Circuit, the recognition clause in the Glidden contract is fully as

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[5] Since the Court of Appeals' prior *Zdanok* decision was based upon New York contract law, there was no conflict between the circuits as of the time the *Oddie* plaintiffs petitioned this Court for a writ of certiorari during the 1962 Term. As Judge Friendly recognized in his opinion in the instant cases, "The Supreme Court's expressed belief that our ruling rested on state law deprives the denial of certiorari in *Oddie* of whatever small significance it might otherwise have had. Supreme Court Rule 19(b)" (footnote on page A-25 of appendix).

descriptive as the recognition clause in the Ross Gear & Tool contract construed by the Sixth Circuit.[6] Both courts approached interpretation of the recognition clauses of these agreements as questions of law presented by clear and unambiguous contract terms.

Application by the Court of Appeals of the so-called "law of the case" doctrine to uphold its prior decision does not affect the conflict. The Court of Appeals recognized that it was required, in view of this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), to reconsider its prior judgment and, in so doing, expressly adopted the prior decision as federal substantive law. Law of the case was applied only because the Court of Appeals did not believe the conflict to show "that the construction previously given by the majority in this Court was wrong" as a matter of federal law (page A-24 of appendix).

The *Zdanok* case was before the Court of Appeals a second time and, as Judge Friendly pointed out, the court's second decision came down "to a calculus of the relative unseemliness of a court's altering a legal ruling as to the same litigants, with the danger that this may reflect only a change in the membership of the tribunal * * *" (page

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[6] The *Oddie* recognition clause provided: "The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the Greater Detroit Area which is located within the city limits * * *" (305 F. 2d at 147).

The Glidden contract, which recited in the preamble that the agreement was made by Glidden "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York," provided in the recognition clause: "The Company recognizes the Union as the exclusive representative of all hourly paid production, maintenance and service employees of the Company at the plant facilities named above * * *" (R. 22). Although identical in legal effect, the Glidden clause is in geographic terms more restrictive than that considered by the Sixth Circuit in *Oddie*.

A-27 of appendix). The reason the Court of Appeals failed to correct its earlier decision is thus peculiar to that court and has no effect on the posture of these cases before this Court. This was recognized by Judge Friendly himself in emphasizing that the Court of Appeals' application of law of the case does not give the decision any special standing before this Court. Here Judge Friendly relied on *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940), where Judge Magruder remarked at page 317:

> "After we affirm a judgment on the ground that our decision on an earlier appeal has become the law of the case, the Supreme Court is nevertheless free to take the case on certiorari and reverse our judgment. * * * The Supreme Court frequently does so. * * * Sometimes it does so even when application for certiorari to review our earlier judgment had been applied for and denied. * * * Our law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case."

Finally, the conflict created is not in any sense diminished by the statement in Judge Friendly's opinion that the only effect of the Sixth Circuit's *Oddie* ruling was to create some doubt as to whether *Zdanok* or *Oddie* would be followed in future cases. This statement only demonstrates what is the inevitable consequence of any conflict among the circuits on an important question of federal law and is the most compelling reason for consideration of these cases by this Court. Moreover, the doubt has been effectively resolved in the Second Circuit against employers in petitioner's position, since the Court of Appeals remains unconvinced that its prior decision was wrong as

a matter of federal law. Hence, the conflict will persist unless and until it is resolved by this Court.

2. The Decision of the Court of Appeals is also in Conflict With Several Decisions of the NLRB Involving the Administration and Enforcement of Collective Bargaining Agreements.

Although holding that description of the bargaining unit in this agreement was merely *descriptio personae* and, accordingly, did not restrict the operative geographical scope of the agreement, Judge Madden recognized in the prior *Zdanok* decision that few of petitioner's employees would have made the move to Bethlehem when the Elmhurst plant was closed (288 F. 2d at 104). This being the case, there is no basis as a matter of federal law for extending by implication any of the respondents' rights under this agreement to Bethlehem, since the NLRB has repeatedly ruled that an employer cannot even expressly contract for the extension of an agreement to a new facility when a majority of the employees fail to follow the work to the new location.[7] *Roover-Lotsch Corp.*, 1960 C. C. H. N. L. R. B. para. 9006; *Edward Aaron Corp.*, 125 N. L. R. B. 840 (1959); *Sinclair Refining Co.*, 92 N. L. R. B. 643 (1950); *St. Regis Paper Co.*, 84 N. L. R. B., 454 (1949). In adopting its prior *Zdanok* decision as federal law, the Second Circuit has given a scope and effect to this agreement by implica-

[7] If, as the Court of Appeals in its earlier decision of 1961 in *Zdanok* said (page A-46 of appendix), referring to the time of the closing of the Elmhurst plant in 1957, "many would not have made the move" to Bethlehem, it certainly cannot be assumed that at the time the agreement was negotiated, the parties contemplated that a majority of the Elmhurst employees would move to a plant in another state should the Elmhurst plant close. See, *e.g.*, *Brown Truck & Trailer Mfg. Co., Inc.*, 106 N. L. R. B. 999, 1002 (1953).

tion which the NLRB has ruled cannot be done by specific provision in the agreement.[8]

An agreement providing for extension to a new facility contemplated by the employer is not only ineffective at the new location, but may also involve the employer in an unfair labor practice in that it deprives employees of a free choice in the selection of their bargaining representative. For example, in *Chicago Freight Car & Parts Co.*, 83 N. L. R. B. 1163 (1949), the Board held that mere execution of an agreement between an employer and the union representing its employees at one location violated §8(a)(1) and (3) of the Act because the agreement purported to include within its geographical scope prospective employees at a facility contemplated by the employer at another location. See also, *NLRB* v. *Masters-Lake Success, Inc.*, 287 F. 2d 35 (2d Cir. 1961), *enforcing*, 124 N. L. R. B. 580 (1959), where the Court of Appeals itself recognized and enforced such an order.

The Court of Appeals' adoption of its prior *Zdanok* decision as one "compatible with the purpose" of §301 of the LMRA is clearly undermined by these decisions of the NLRB. Employers in the Second Circuit are now given the Hobson's choice of either extending contractual obligations beyond their negotiated scope in violation of the LMRA, or complying with the Act and thereby subjecting themselves to damage suits by dissatisfied employees. Any

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[8] Other courts have refused to make such a paradox of the national labor policy. *Oddie* v. *Ross Gear & Tool Co., Inc., supra; Bradley* v. *Sangamo Elec. Co.*, 46 C. C. H. Lab. Cas. para. 17,843 (Ill. Cir. 1962), and the overwhelming weight of arbitration authority is that "the description of the bargaining unit in terms of geographical location is not merely *descriptio personae*," but defines and limits the operative geographical scope of the agreement. *United Packers, Inc.*, 38 L. A. 619, 620 (1962); *Sivyer Steel Castings Co.*, 39 L. A. 449 (1962).

decision imposing such a dilemna on well-meaning employers can hardly be what this Court called for in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957), where it directed the lower federal courts "to find the rule that will best effectuate the federal policy."[9]

B. As a Matter of Federal Substantive Law, the Seniority Provisions of a Collective Bargaining Agreement do not Survive Good-Faith Termination of the Agreement in Accordance with its Terms.

1. The Holding of the Court of Appeals to the Contrary is in Conflict With Decisions of this Court and Decisions of the Courts of Appeals for the Fifth, Sixth, Seventh and Ninth Circuits.

It is well established as a matter of federal substantive law that an employee can acquire no "inherent right to seniority in service." *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 53 (1947); *NLRB* v. *Wheland Co.*, 271 F. 2d 122, 124 (6th Cir. 1959). Federal courts have consistently held that seniority rights do not extend beyond good-faith termination of the agreement under which they were acquired since, under federal law, they are dependent upon the existence of such an agreement and an employer-employee relationship. *System Federation No. 59 of Ry. Employees* v. *La. &*

[9] The Court of Appeals abruptly dismissed the foregoing cases, saying that these cases "do not say that a contract whereby an employer undertook to recognize existing seniority in hiring at a new plant would constitute an unfair labor practice, or that an employer who had so contracted would commit an infraction by refusing to violate his commitment in a bargain with the duly chosen representative at the new location." (page A-25 of appendix). This comment is in direct conflict with the holdings in these cases and ignores the fact that the unfair labor practice consists in the execution, as well as performance, of such an agreement. *Chicago Freight Car & Parts Co., supra* at 1165.

A. Ry. Co., 119 F. 2d 509 (5th Cir. 1941); *Colbert* v. *Brotherhood of R. R. Trainmen*, 206 F. 2d 9 (9th Cir. 1953), *cert. denied*, 346 U. S. 931 (1954); *Shiels* v. *Baltimore & O. R. R.*, 154 F. Supp. 917 (S. D. Ind. 1957); *aff'd*, 254 F. 2d 863 (7th Cir. 1958), *cert. denied*, 356 U. S. 846 (1958); *Local Lodge 2040, Int'l Ass'n of Machinists* v. *Servel*, 268 F. 2d 692, 698 (7th Cir. 1959), *cert. denied*, 361 U. S. 884, (1959); *NLRB* v. *Int'l Ass'n of Machinists*, 279 F. 2d 761 (9th Cir. 1960), *cert. denied*, 364 U. S. 890 (1960).

While the fact patterns in each of the foregoing cases vary from case to case, each case was decided on the theory that seniority rights are creatures of agreement and do not survive either termination of the agreement under which they are acquired or termination of the employer-employee relationship. This principle, which is well established as a matter of federal law, does not vary from case to case and stands in direct opposition to the decision of the Court of Appeals that respondents acquired "vested rights" in their seniority which survived good-faith termination of this agreement.

This aspect of the decision of the Court of Appeals cannot be dismissed as a factual matter based solely on the particular terms of the agreement under consideration. Contracts providing for retention of seniority rights by laid-off employees for periods ranging from one to three years are the rule, not the exception, in unionized industries. Harbison, *Seniority Policies and Procedures as Developed Through Collective Bargaining* 57 (1941); see also, *Analysis of Layoff, Recall and Work Sharing Procedures in Union Contracts*, U. S. Dept. of Labor Bull. No. 1209 (1957); *Seniority Provisions in Union Agreements*, U. S. Dept. of Labor Bull. R. 1308 (1941). In fact, such a provision is not necessary to retention of seniority during layoff so long as the contract remains in effect. *A. D. Julliard &*

Co., 15 L. A. 934 (1951). Provisions of this nature are designed to limit rather than extend the recall period.

Here, as in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 333 (1953), this Court should grant certiorari "because of the wide-spread use of contractual provisions comparable to those before us and because of the general importance of the issue in relation to collective bargaining." Problems arising from retention of seniority in plant relocations present recurring problems in every segment of industry in the United States and most certainly warrant the attention of this Court.

Reasons for Granting the Writ in the *Alexander* Case.

A. The Doctrine of Collateral Estoppel Does Not, as a Matter of Federal Law, Prevent a Common Defendant from Relitigating Issues, Adversely Determined in a Prior Action, Against Strangers to that Judgment in Subsequent Proceedings.

1. The Court of Appeals' Ruling to the Contrary Involves an Important and Recurring Question of Federal Substantive Law Which Conflicts With Decisions of this Court and of the Courts of Appeals for the First, Third, Sixth, Ninth and Tenth Circuits.

After adopting its prior *Zdanok* decision as federal law in that case, the Court of Appeals moved to the companion case of *Alexander*, saying that "since both the *Zdanok* and *Alexander* actions present questions of federal law, we are free to follow our own conceptions as to the effect of the judgment in the former on the latter" (page A-34 of appendix). The co[illegible] then held that petitioner was col-

laterally estopped from contesting liability in *Alexander* by virtue of the first *Zdanok* decision, although none of the *Alexander* plaintiffs were parties to that action, additional plaintiffs being added right up until the time of trial in 1963.

This Court has long recognized that "the operation of an estoppel must be mutual," *Keokuk & Western Ry. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894), and that persons who would not have been affected by an adverse decree in a prior suit cannot take advantage of the same by way of estoppel.[10] *United States* v. *Pink*, 315 U. S. 203 (1942); *Triplett* v. *Lowell*, 297 U. S. 638 (1936). By holding that petitioner was precluded by virtue of the *Zdanok* decision from contesting liability in *Alexander*, the Court of Appeals made a drastic and unprecedented departure from a rule vital to the proper administration of justice in the federal courts and uniformly applied by this Court and every Court of Appeals which has had occasion to consider the issue as a matter of federal law.

The Court of Appeals' *Alexander* decision stands in direct conflict with that of the First Circuit in *Bird* v. *United States*, 241 F. 2d 516 (1st Cir. 1957), where Judge Magruder held that a shareholder of a Massachusetts corporation could not estop the Government from contesting whether a distribution of preferred stock was taxable as income on the basis of an adverse judgment in a case involving the same distribution to other shareholders of the same corporation.

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[10] The leading case in this area is *Keokuk & Western Ry. Co.* v. *Missouri*, *supra*, where this Court denied a corporation the right to use a judgment obtained in a prior suit by shareholders of the corporation in an identical action against the same defendants. Exceptions to this rule were noted by Circuit Judge A. N. Hand in *Adriaanse* v. *United States*, 184 F. 2d 968 (1950), *cert. denied*, 340 U. S. 932 (1951), relied on by the Court of Appeals in support of its estoppel ruling. *Alexander* does not fall within these recognized exceptions to the rule but represents a new and ill-considered exception which completely engulfs the general rule.

The decision of the Court of Appeals in *Alexander* provides a perfect parallel with those facts held insufficient for application of estoppel by judgment in *Bird*. The First Circuit denied the plaintiff in *Bird* the right to hold the Government to an issue determined in a prior suit involving the same distribution to other shareholders of the same corporation. The court below, however, permitted respondents in *Alexander* to hold petitioner to an interpretation of the bargaining agreement reached in a prior suit involving other employees of the same company. The cases differ only in result and create a conflict which can be resolved only by this Court.

The unprecedented decision of the Court of Appeals in *Alexander* also runs contrary to decisions of the Tenth Circuit, *Crawford Production Co.* v. *Bearden*, 272 F. 2d 100 (10th Cir. 1959); the Ninth Circuit, *Moore* v. *United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U. S. 827 (1947); the Sixth Circuit, *Madden* v. *Mack Sim Bar Paper Co.*, 103 F. 2d 974 (6th Cir. 1939), *cert. denied*, 308 U. S. 556 (1939); and the Third Circuit, *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (3d Cir. 1917), *appeal dismissed*, 248 U. S. 595 (1919), where the mutuality rule was applied and strangers to prior proceedings were denied the right to use prior judgments offensively in subsequent actions involving other parties common to the earlier suits.

The decision of the court below in *Alexander* thus stands alone as a matter of federal law and in direct conflict with decisions of this Court and several Courts of Appeals. Needless to say, any deviation from rules of law uniformly applied by the federal courts for some 70 years is a matter which requires exercise of the supervisory jurisdiction of this Court. The fact that this was done by the Court of Appeals to exclude evidence which, by the court's own admission, might have been "decisive" (page

A-29 of appendix) commends this case to this Court as a matter of equity as well as necessity.[11]

In its determination to avoid the merits in *Alexander*, the Court of Appeals created what some commentators have critically referred to as the "multiple claimant anomaly." See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 Tul. L. Rev. 301 (1961). Thus, under the rule fashioned by the Court of Appeals, a party against whom 50 successive actions are filed could not assert the conclusive effect of favorable judgments obtained in the first 25 actions tried in any subsequent actions. However, if the plaintiff should prevail in the 26th case tried, the defendant may be estopped from contesting liability in every subsequent action.

Judge Friendly found "understandable" the "belief that something was wrong in that picture" and sought to avoid the problem by limiting the *Alexander* rule to cases in which the party against whom the plea of estoppel is asserted has had "a full and fair opportunity to litigate the issue effectively" (page A-33 of appendix). This standard only begs the question posed by the anomaly and

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[11] The case considered by the Court of Appeals to provide the most support for its estoppel ruling was the California Supreme Court's decision in *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942). But *Bernhard*, a case decided under California law, was a case in which a stranger to the prior suit was permitted to assert *as a defense* the conclusive effect of the prior judgment against a party to that action. Even in California, where Judge Friendly says "the widest breach in the citadel of mutuality" occurred (page A-30 of appendix), the mutuality requirement persists where an adverse judgment is sought to be asserted against a common defendant in successive actions brought by similarly situated plaintiffs. *Navarov* v. *Caldwell*, 161 Cal. App. 2d 762, 327 P. 2d 111 (1958), *hearing denied*, 327 P. 2d 122 (1958).

Judge Friendly (footnote 15 on page A-30 of appendix) stated "On its facts the *Bernhard* case would seem to have come within a long recognized exception to the requirement of privity—namely, that a judgment in favor of an indemnitor precludes a later action against an indemnitee".

offers little justification for the staggering disadvantage imposed by the court below on common defendants to successive actions brought by similarly situated plaintiffs.[12]

The tremendous impact the decision below will have on the administration of justice in the federal courts is nowhere more apparent than in the area of law forming the context of this very case. In *Smith* v. *Evening News Ass'n, supra*, this Court established rights of action under collective bargaining agreements for individual employees as a matter of federal law. In *Alexander*, however, the court below established by means of an unprecedented application of the doctrine of collateral estoppel that employers may defend once and only once any action of this nature. The court below has thus converted the individual claims authorized by this Court's *Smith* decision into class actions which now can determine liability of an employer to literally thousands of employees.[13] Any decision which disrupts such established rules of judicial administration and so impedes implementation of the national labor policy is a matter which demands consideration and decision by this Court.

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[12] The anomaly is in no way changed by the fact that the defendant may have had "a full and fair opportunity" to defend one case. The suggested test has even less merit in cases where, as here, the issue on the merits is admitted by the court to be "such a close one" (page A-29 of appendix). Those waiting in the wings for the right result naturally will resist consolidation.

[13] The bandwagon psychology such a decision creates is also apparent upon examination of the case under consideration where several plaintiffs were added right up to and after the time of trial in 1963 (pages 776, 1014, 1150 of Record from the United States District Court, Southern District). Moreover, one of the respondents in *Alexander* testified upon trial of this action in the District Court that he had never made any claim of his own against petitioner, and that it was only after receiving letters from counsel for respondents that he decided to become a plaintiff in the *Alexander* action and make a claim against petitioner for loss of seniority. (R. 97.) Far from promoting repose and judicial economy, the decision of the court below can only encourage frivolous claims in the hope that one will succeed and thereby establish liability for any number of similar claims.

B. A Decision of this Court Changing Controlling Principles of Law and Intervening Between two Proceedings Involving a Common Defendant Renders the Doctrine of Collateral Estoppel Inapplicable to the Second Proceeding.

1. In Applying Collateral Estoppel to the *Alexander* Case Despite the Intervening Decision of this Court in *Smith* v. *Evening News Association*, 371 U. S. 195 (1962), the Court of Appeals Decided a Recurring Question of Federal Law in Conflict With Decisions of this Court and the Courts of Appeals for the Third and Ninth Circuits.

The court below held petitioner estopped from contesting liability in the *Alexander* case on the basis of its prior *Zdanok* decision, a case recognized by this Court (370 U. S. at 530) and the Court of Appeals as one decided under New York contract law (page A-23 of appendix). This was done by the Court of Appeals despite this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), which determined for the first time that actions brought by individual employees against their employers under collective bargaining agreements should be controlled, as a substantive matter, by federal law.

It is not entirely clear what consideration the Court of Appeals gave to this Court's *Smith* decision by way of its effect on the applicability of collateral estoppel to the *Alexander* case since the estoppel issue was never raised, briefed or argued in the courts below. The *Smith* case is discussed by the Court of Appeals in that portion of the opinion relating to *Zdanok* (page A-22 of appendix). There Judge Friendly refused to alter the prior *Zdanok* decision because the intervening change of law did not create "a clear conviction of error" with respect to the prior decision

(page A-27 of appendix). It can only be concluded that since *Smith* failed to demonstrate clear error with respect to the first *Zdanok* decision and, accordingly, provided no basis for deviation from the "law of the case" in *Zdanok*, the Court of Appeals considered it equally ineffective as a means of rendering the estoppel doctrine inapplicable to *Alexander*.

While the Court of Appeals may have required "clear conviction of error" before deviating from the limited law of the case in *Zdanok* upon the second appeal of that action,[14] there is no basis as a matter of federal law for requiring such a showing to render collateral estoppel inapplicable to the *Alexander* case. Indeed, the Court of Appeals was required to consider petitioner's liability in *Alexander* on the basis of federal law and the evidence presented to the district court in 1963 without regard to the "law of the case" restrictions established on the prior appeal of the *Zdanok* case. Its failure to do this brings the *Alexander* decision in conflict with decisions of this Court and Courts of Appeals for the Third and Ninth Circuits.

Collateral estoppel, this Court has held, must "be confined to situations where the matter raised in the second suit *is identical in all respects* with that decided in the first proceeding." *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948). One factor always recognized by this Court to alter the identity of two proceedings is an intervening change of law which renders collateral estoppel inapplicable to the

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[14] But see, *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940), a case relied on by the Court of Appeals in support of its refusal to alter the prior *Zdanok* decision, where the court said: "But the Circuit Court of Appeals on second appeal certainly would not follow its earlier law of the case when there had intervened between the two appeals a controlling opinion of the Supreme Court." (116 F. 2d at 319).

second action. *Commissioner* v. *Sunnen, supra; Blair* v. *Comm'r*, 300 U. S. 5 (1937).

The intervening change of law need not be one demonstrating "clear error" in the first proceeding, as the court below required, but need only be "material" to the issues previously before the court and thereby raise the possibility of a different outcome upon reconsideration of the merits of the dispute. *Parker* v. *Westover*, 221 F. 2d 603 (9th Cir. 1955); *Commissioner* v. *Thomas Flexible Coupling Co.*, 198 F. 2d 350 (3d Cir. 1952); *Cf.*, *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940). There is no more appropriate case for application of this rule than *Alexander*, where petitioner was held estopped on the basis of a decision admittedly resting on state law despite this Court's intervening direction that federal substantive law should be controlling.

The *Alexander* decision is in direct conflict with this Court's decision in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948). There a prior ruling on payments made by the taxpayer to his spouse under a 1928 license agreement caused the Tax Court and the Eighth Circuit to bar a different result on grounds of estoppel for royalties paid pursuant to the same agreement in 1937. Despite the fact that there was a "complete identity of facts, issues and parties" in the two proceedings, this Court reversed the judgment of the Court of Appeals and remanded the case for reconsideration on the ground that intervening decisions of this Court concerning intra-family assignments of income *in other areas* represented "a sufficient change in the legal climate to render inapplicable * * * the doctrine of collateral estoppel." (333 U. S. at 606).

Also in conflict with the decision of the court below is *Parker* v. *Westover*, 221 F. 2d 603 (9th Cir. 1955), where

the District Court dismissed an action for refund of taxes by members of a family partnership on the basis of a prior decision, affirmed by the Ninth Circuit, which held the partnership invalid for tax purposes. Rejecting the Government's contention that an intervening change in law was not sufficient to render the estoppel doctrine inapplicable, the Ninth Circuit said (221 F. 2d at 606):

> "This is erroneous. In tax cases, a change in the controlling legal principles may make a prior determination obsolete. Collateral estoppel must be confined to situations where applicable legal rules remain unchanged; '* * * a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.' *Commissioner of Internal Revenue* v. *Sunnen*."[15]

See also, *Commissioner* v. *Thomas Flexible Coupling Co.*, 198 F. 2d 350 (3d Cir. 1952), where the Third Circuit expressly held, contrary to the decision of the court below, that "clear error" is not the test to be applied in determining whether an intervening change of law renders the doctrine of collateral estoppel inapplicable.

These cases demonstrate that the issue before the Second Circuit in *Alexander* was not whether the intervening change in controlling law announced by this Court's

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[15] The intervening change of law brought to the Ninth Circuit's attention in *Parker* was a statutory amendment which, although liberalizing the tests for validity of family partnerships, was not enacted until five years after the tax years in question and had no retroactive application. It was the legislative history of the new statute which the Ninth Circuit directed the district court to consider even though it merely recited what the Court of Appeals believed had "always been the law" and contained matters already considered by the court below (221 F. 2d at 603).

Smith decision created "a clear conviction of error" with respect to the prior *Zdanok* decision, but whether the decision effected "a sufficient change in the legal climate to render inapplicable, in the instant proceeding, the doctrine of collateral estoppel." *Commissioner* v. *Sunnen, supra,* at 606. The change in controlling law announced by this Court in *Smith* necessarily raised new issues in *Alexander* and called into play new factors for consideration by the Court of Appeals in this case.[16]

Perhaps the most convincing evidence of the "change in the legal climate" effected by *Smith* is the reaction of the Court of Appeals to the decision of the Sixth Circuit in *Oddie* v. *Ross Gear & Tool Co., Inc., supra,* a case decided on the basis of applicable federal law. Discussing the effect of this case, Judge Friendly remarked (page A-25 of appendix):

> "What the *Oddie* ruling does create, particularly when it is superimposed on Chief Lumbard's earlier dissent here and the great amount of critical discussion in the law reviews that our decision has engendered, is doubt whether, if other similar contracts should come before us for construction, we ought follow the lead of our divided decision in this case or of the unanimous contrary one of the Sixth Circuit in *Oddie.*"

The "doubt" these intervening decisions created may not have been sufficient for the Court of Appeals to alter

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[16] To make "clear error" rather than materiality the test, is to require review of the merits of a dispute as a prerequisite to determining whether the court is free to review the merits. This approach, resulting from the Court of Appeals' curious blend of "law of the case" and collateral estoppel principles, runs contrary to the very policy of judicial economy underlying the estoppel doctrine.

its prior *Zdanok* decision since it required "clear conviction of error" before deviating from the "law of the case" established on the prior appeal of that case. There can be no question, however, that such a doubt is all that is required to entitle petitioner to full consideration of its liability in *Alexander* as a matter of federal law.

Petitioner has been held estopped from contesting its liability in *Alexander* on the basis of a decision admittedly resting on state law[17] and, in the process, the directive of this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), where the lower federal courts were called upon to fashion a body of federal substantive law in this area, has been completely thwarted. By carrying over to *Alexander* the "law of the case" restrictions of *Zdanok*, the Court of Appeals rendered itself incapable of making the judgment that both *Lincoln Mills* and the more recent *Smith* decision required in this case. Here, as in *Commissioner* v. *Sunnen*, *supra*, the Court of Appeals "was unable to bring to bear • • • the full breath of the ideas" made relevant by the intervening change of law (333 U. S. at 607). Petitioner submits that the potpourri created by the court below in *Alexander* is not the creative and deliberative effort called for by this Court in *Lincoln Mills*, or what this petitioner is entitled to under this Court's more recent *Smith* decision.

It is no justification to say, as Judge Friendly did, that federal and New York law "are alike in that a court's job in interpreting a contract is to ascertain what the parties meant by the words they used" (page A-24 of appendix).

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[17] At the time the *Alexander* case came on for trial in the District Court, the only judgment which could have estopped petitioner was the first *Zdanok* decision, a case decided under New York contract law. It was not until the second appeal of the *Zdanok* case that the prior decision was reconsidered by the Court of Appeals and adopted as federal substantive law.

Indeed, to describe federal substantive law in this area with the simplicity suggested by the Court of Appeals is to reduce *Lincoln Mills* and its progeny to a tedious exercise in trivialities. The Second Circuit itself held long prior to *Lincoln Mills* that since §301 of the LMRA establishes a new cause of action for breach of collective bargaining agreements, it is "immaterial" whether or not the evidence presented would be sufficient for recovery on a similar cause of action brought under New York law. *Shirley-Herman Co., Inc. v. Int'l Hod Carriers*, 182 F. 2d 806 (2d Cir. 1950).

The Court of Appeals denied petitioner in *Alexander* not only the heretofore established right to defend against different parties in a different lawsuit (Part A, page 16 hereof), but also the more important right to a determination of its liability under federal law as required by this Court's intervening *Smith* decision. Accordingly, the *Alexander* case cannot be permitted to pass without consideration by this Court. Petitioner is entitled to a determination of its liability in *Alexander* as a matter of federal law by either this Court or the Court of Appeals on remand of the case to that court.

Conclusion.

For the foregoing reasons, the petitions for writs of certiorari should be granted in these cases.

Dated April 27, 1964

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APPENDIX.

Opinion of the Hon. Edmund L. Palmieri, Dated April 4, 1963.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

OLGA ZDANOK, *et al.*, Plaintiffs, *against* THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, Defendant.	Civil 135-16
FRANK T. ALEXANDER, *et al.*, Plaintiffs, *against* THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, Defendant.	Civil 62-2244

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Opinion of the Honorable Edmund L. Palmieri, dated April 4, 1963.

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PALMIERI, J.

This is the second time *Zdanok* v. *Glidden* has been before this Court. It is here again after a considerable appellate history.[1] The issues themselves are of far-reaching significance in the field of labor law. They relate to the interpretation of a collective bargaining agreement dated March 13, 1956 that covered defendant's employees at Elmhurst, Long Island.

In 1957, and as the result of a bona fide business decision, defendant transferred its Elmhurst operations to Bethlehem, Pa., closing the Elmhurst plant. Defendant offered to give fair consideration to applications of its Elmhurst employees for employment at Bethlehem, but only with the status of new employees. Plaintiffs in these actions are the individual members of the union who have contended that the collective bargaining agreement obligated defendant to employ them at Bethlehem without loss of seniority, pension, welfare, and other rights.

At the original trial of the *Zdanok* case in 1960, this Court dismissed the complaint and entered judgment for defendant. 185 F. Supp. 441 (S. D. N. Y. 1960). The Court of Appeals reversed this decision, 288 F. 2d 99 (2d Cir. 1961), holding that the employees had certain vested rights under the contract that were not subject to termination by relocation of the Elmhurst plant in another state.[2] Although

[1] See notes 2-5 *infra*, and accompanying text.

[2] Petitions for rehearing and rehearing *en banc* were denied, 288 F. 2d 99.

the case then went before the Supreme Court on certiorari, the sole issue accepted by that Court for review was whether the presence of a Court of Claims judge on the Court of Appeals panel invalidated the decision.[3] The Supreme Court's subsequent decision confirming the validity of the judge's participation[4] left undisturbed the Second Circuit's resolution of the merits in favor of plaintiffs.[5]

Upon remand of the *Zdanok* case, it was consolidated with *Alexander* v. *Glidden,* which is identical with *Zdanok* except that other employees are plaintiffs. Another trial was held on the liability issue, so that the parties have had a full opportunity to bring to the Court's attention any proof bearing upon the interpretation of the contract. Defendant has again moved to dismiss. The first ground for this motion is that recent decisions have demonstrated error in the earlier *Zdanok* opinion in the Court of Appeals. Defendant's argument is, in substance, that the Court of Appeals based its interpretation of the contract on state rather than federal law.[6] The Supreme Court has since made it clear that when suit is brought by individual employees for violation of a collective bargaining agreement, federal rather than state law must be applied.[7]

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[3] 368 U. S. 814 (1961).

[4] 370 U. S. 530 (1962).

[5] See also 31 U. S. L. Week 3119 (Oct. 9, 1962) (denial by the Supreme Court of defendant's attempt to have that Court give untimely reconsideration to the original denial of certiorari on the merits).

[6] See *Zdanok* v. *Glidden*, 370 U. S. 530, 537:

> The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants.

[7] *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962). See also *Black Clawson Co.* v. *Int'l Ass'n of Machinists*, 313 F. 2d 179, 184 (2d Cir. 1962). The Glidden Company at all material times was an industry affecting interstate commerce within the meaning of Section 301(a) of the Labor Management Relations Act.

Opinion of the Honorable Edmund L. Palmieri, dated April 4, 1963.

Defendant claims that under federal law, seniority and other rights cannot be held to have survived the good faith closing of the Elmhurst plant.

However, the Supreme Court's holding in *Smith* v. *Evening News Ass'n* that federal law must be applied to employee actions on collective bargaining agreements did not terminate the possible relevance of any decision not expressly decided as a matter of federal law. Indeed, as pointed out in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957):

> . . . state law, if compatible with the purpose of Section 301 (of the Labor Management Relations Act, 29 U. S. C. §185) may be resorted to in order to find the rule that will best effectuate the federal policy.

So here, unless later controlling authorities had made it clear that the *Zdanok* decision must remain outside the scope of federal law, this Court would not be free to disregard the earlier Court of Appeals' determination.[8]

In *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), the Court of Appeals intimated that it might on a proper occasion undertake to reexamine the principles on which the *Zdanok* case was based. It was also pointed out that:

> *Zdanok* cannot properly be read to govern situations which are not strictly within the facts there presented. More particularly the case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken. (at 186).

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[8] And perhaps not even then. See *Higgins* v. *California Prune & Apricot Growers*, 3 F. 2d 896 (2d Cir. 1924).

The Court, however, only limited *Zdanok*. It did not disavow the decision. And it stated that the principle of *Zdanok*, that rights under a labor agreement might be prospective in character, was applicable to arbitration in the sense that "Grievances . . . based upon conditions arising *during the term of the agreement to arbitrate* are arbitrable after that term has ended."[9]

In another recent decision, *Livingston* v. *John Wiley & Sons*, 313 F. 2d 52 (2d Cir. 1962), the Court of Appeals indicated that it did not consider *Zdanok* inapposite as a source of federal law. The issue in *Livingston* was whether rights under a collective bargaining agreement could survive consolidation of the employer corporation with another company, at least insofar as a motion to compel arbitration under the agreement was concerned. In holding that the union could compel arbitration of its claim that seniority, job security, grievance procedure, vacation and severance pay, and certain pension rights were "vested," the Court specifically referred to *Zdanok* as one case in which the possibility of "vested" rights had been recognized. The Court also cited several other cases decided on the basis of state law[10] without suggesting that their applicability was disminished because federal law governed the claim before it. Moreover, and perhaps just as important, the Court described *Oddie* v. *Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir.), *cert. denied*, 371 U. S. 941 (1962),

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[9] 312 F. 2d 181, at 186 (emphasis in the Court of Appeals' opinion).

[10] *Botany Mills, Inc.* v. *Textile Workers*, 50 N. J. Super. 18, 141 A. 2d 107 (App. Div. 1958); *In re Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't 1955), *aff'd sub nom. Potoker* v. *Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 141 N. E. 2d 841 (1957); *New York City Omnibus Corp.* v. *Quill*, 189 Misc. 892, 73 N. Y. S. 2d 289 (Sup. Ct.), *modified on other grounds*, 272 App. Div. 1015, 74 N. Y. S. 2d 925 (1st Dep't 1947), *aff'd*, 297 N. Y. 832, 78 N. E. 2d 859 (1948); *Roddy* v. *Valentine*, 268 N. Y. 228, 197 N. E. 260 (1935).

the principal case claimed to support defendant's position, as a decision that recognizes that "the matter is solely one of the 'construction of the agreement.'"

It is evident from these decisions that *Zdanok* v. *Glidden* retains validity in the Second Circuit, although of somewhat diminished proportions, and that defendant's motion to dismiss based on error in that decision must be denied.

Defendant urges, in the second instance, that irrespective of what the Court of Appeals held in the *Zdanok* case with the record that was before it, the evidence adduced at this second trial demonstrates that the contracting parties did not intend that seniority and other rights should survive the closing of the Elmhurst plant. During the second trial many aspects of the labor relations history of the Glidden Company Elmhurst plant were explored. A former official of defendant, who had negotiated the contract in suit, testified that during the negotiations the company indicated to the union that it might have to close the Elmhurst plant. The union then made a demand for a severance pay program, which the company refused. The witness stated that no discussions occurred during the negotiations with respect to the transfer of employees from the Elmhurst plant to any other plant where the Elmhurst operations might be carried on.

This official, and another who had participated in meetings with the union in the period immediately preceding the closing of the plant, also testified that the union representatives conceded at such meetings that the contract placed no obligations on the company in respect to an offer of employment at Bethlehem. As one of the witnesses stated:

> Mr. Hoppman [the union's lawyer] also brought up this question of seniority and requested we grant some seniority or preference to employees who might go to Bethlehem. He did not indicate there was any

> claim under the contract; in fact, he said there wasn't, as Mr. Crotty [the union representative] also told me that there was nothing under the contract that would require us to do it, but he thought we ought to give some consideration to the people who went to Bethlehem. (Transcript 95-96).

The testimony of the other witness was to the same effect; that the union attempted to convince the company that it ought to give seniority or other preference to transferring employees, but this was in the nature of a request rather than something to which the union claimed to be entitled under the contract.[11]

It is true that in October of 1957 the union served a notice of intention to arbitrate its dispute with the Glidden Company, and that Issue 4 of this notice was:

> Whether the collective bargaining agreement is being breached by the Employer in the removal of its plant from the City of New York and by failing to offer each employee continued employment with full seniority.[12]

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[11] Defendant also demonstrated that when the refinery operations were transferred to Louisville, Kentucky, in 1956, the union made no claim to severance pay or to transfer of employees to Louisville. It should be noted, however, that since there was plant-wide seniority, most of the employees in the refinery division were able to remain in the Elmhurst plant by "bumping" employees in other divisions.

[12] This notice was preceded in September by a letter of the union advising the New York State Board of Mediation that it wished to submit for arbitration "the refusal of the company to offer to its present employees employment at its new plant." The company's reply, dated September 18, 1957, states that the company had never refused to offer its Elmhurst employees work at Bethlehem, and would give fair consideration to any such application. The company also took the position that transfer of the employees was not within the specific terms of the agreement and hence was not arbitrable.

Opinion of the Honorable Edmund L. Palmieri, dated April 4, 1963.

The same issue was included in the further legal proceedings that eventually resulted in the decision that the company had no obligation to arbitrate with respect to the issues raised by the union.[13] However, it does not appear that the union made the claim prior to its being raised in the context of arbitration. The union officials who were familiar with the contract and who participated in meetings with the company, were not called to testify, and it seems reasonable to infer that they would not have challenged the testimony of defendant's witnesses. Thus, defendant's evidence stands uncontradicted that through the middle of September, at the various meetings between the company and the union, the union agreed with the company's assertion that the employees had no rights under the contract to re-employment at Bethlehem with seniority.

On the evidence that was adduced before it, this Court finds that the parties entertained no expectation that the employees' rights would survive the removal of the Elmhurst plant to another state. The testimony of defendant's witnesses with respect to the bargaining that preceded the contract, the conduct of the parties during its term, and negotiations at the meetings prior to the closing of the plant stands uncontradicted and in opposition to plaintiffs' interpretation of the contract.

The Court of Appeals, however, has taken a different view on the basis of the contract itself and the implications to be drawn from its terms. This Court considers itself bound by the Court of Appeals' interpretation notwithstanding the import of the evidence referred to. Accordingly, defendant's motion to dismiss, insofar as it is based on the evidence introduced at the second trial, must be denied.

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[13] *Matter of Gen'l Warehousemen's Union*, 10 Misc. 2d 700, 172 N. Y. S. 2d 678 (1958).

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One final contention of defendant is that plaintiffs cannot prevail on the "liability" issue unless they first demonstrate that they were ready, willing and able to go to Bethlehem. Plaintiffs contend that this issue relates only to the amount of damages.

The difference between the parties on this issue is more imaginary than real. A plaintiff who cannot show that he would have transferred to Bethlehem suffered no damages from defendant's breach and would, at most, be entitled to nominal damages. On the other hand, since the proof on this issue will differ with each plaintiff, administration of these cases can be facilitated if this question is determined in the context of ascertaining the result of defendant's breach of the agreement with respect to each individual plaintiff.

The issue of plaintiffs being ready, willing and able to go to Bethlehem, then, will be tried as part of the damage proceedings. The burden of proof on this issue will rest on plaintiffs, subject to the admonition in the Court of Appeals' opinion in the *Zdanok* case that:

> Proof [on this issue] may well fall short of complete conviction, but the trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.[14]

There remains to be discussed the question of an interlocutory appeal. During the course of one of the many conferences between the Court and counsel, devoted to the exploration of ways of properly administering this multifaceted litigation, defendant expressed its desire to take an immediate appeal from an adverse ruling on the question of liability. Plaintiffs' counsel indicated that he would not oppose such an appeal. The criteria governing the Court's

[14] 288 F. 2d 99, at 104.

decision on this request are to be found in 28 U. S. C. §1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

First, there is here a controlling question of law. That question is whether as a matter of federal law that must now be applied to interpret the contract, plaintiffs' rights survived the closing of the Elmhurst plant. It is, of course, true that this question relates to the intentions of the parties, and hence contains certain "factual" elements not present in other more abstract questions of law. However, in this case intent turns primarily on the interpretation of the provisions of the written contract, and the inferences arising therefrom. In this context, the Court of Appeals will not merely be deciding whether this Court's determination of factual evidence was clearly erroneous, a situation that would cause far greater hesitancy in the certification of an interlocutory appeal.

The second requirement is that there be substantial ground for difference of opinion with respect to the controlling question of law. In this respect note may again be taken of Judge Hays' comments on the *Zdanok* case in *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co., supra*, and of *Oddie* v. *Ross-Gear & Tool Co., supra*, that as a matter of federal law expressly refused to recognize contentions similar to plaintiffs'. Chief Judge Lumbard, in dissent in the earlier *Zdanok* case, also squarely relying on federal law, stated his belief that plain-

tiffs' right could not survive the good faith closing of the Elmhurst plant.[15] These decisions indicate that the requirement as to a substantial ground for difference of opinion has been satisfied.[16]

Finally, as to the third requirement of a material advance in the ultimate termination of the litigation, this is clearly met, since defendant's contention goes directly to the merits,[17] and, if correct, will conclude this litigation without the further extended proceedings now in prospect with respect to the damage issue.

In view of the rather strict criteria that quite properly surround the interlocutory appeal section in an effort to prevent its use to erode the final judgment rule, it may be well to indicate in greater detail some of the factors that have impelled this Court to authorize an interlocutory appeal. There are in the two consolidated cases a total of 162 plaintiffs. Most, if not all, are working people who are dispersed and who would be unable to attend a prolonged trial without serious inconvenience. As to each there remains a full-fledged hearing on the damage question.

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[15] The examination of federal law at the close of the first trial led this Court also to conclude that plaintiffs had no cause of action. 185 F. Supp. 441, at 442. See also *Local Lodge 2040* v. *Servel, Inc.*, 268 F. 2d 692 (7th Cir.), *cert. denied*, 361 U. S. 884 (1959).

[16] See generally, Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962); Lowden, Survival of Seniority Rights Under Collective Agreements; *Zdanok* v. *Glidden Co.*, 48 Va. L. Rev. 291 (1962); 110 U. Pa. L. Rev. 458 (1962); 61 Colum. L. Rev. 1363 (1961). See also *Atlantic City Elec. Co.* v. *Gen. Elec. Co.*, 207 F. Supp. 613, 619-20 (S. D. N. Y. 1962) ("a narrow approach is not justified" in determining whether the substantial difference of opinion requirement has been satisfied, when strong reasons exist for the conclusive and expeditious determination of an issue by interlocutory appeal).

[17] These facts distinguish this case from *Atlantic City Elec. Co.* v. *A. B. Chance Co.*, 2d Cir., Jan. 31, 1963, in which the Court of Appeals refused to permit interlocutory appellate review of a discretionary discovery order.

Opinion of the Honorable Edmund L. Palmieri, dated April 4, 1963.

Inquiry must be made into the available jobs at Bethlehem and the plaintiffs, perhaps all, who would have filled them. Each plaintiff will have to prove that he was ready, willing and able to go to Bethlehem, and must establish the particular seniority, pension, welfare, and group insurance benefits to which he was entitled and of which he claims deprivation by defendant's failure to recognize vested seniority rights at the Bethlehem plant. 288 F. 2d 99, at 104. Earnings since 1957, and other factors will also have to be explored on the question of mitigation of damages. This will necessitate examination not only of the plaintiffs involved, but of other witnesses who have knowledge of the relevant facts. In effect, 162 separate trials must be had, with a great expenditure of time, money, and effort by the parties and the corresponding utilization of court facilities.[18] It might also be mentioned that in spite of contrary allusions in some of the papers, it is not feasible to refer this matter to a master for any purpose as there would be no way to meet the costs in the event of a conclusion adverse to the plaintiffs. There is now every indication that plaintiffs will insist that all of the damage claims be tried to a jury. More than this, the Court as well as the parties have exhausted every present means for the stipulation and admission of facts; and what has been said concerning the burdens of a prospective trial assumes that no further efforts can reasonably be made in this direction.

This Court also believes that this case is in an appropriate posture for appellate review. Unlike those instances in which certification of an interlocutory appeal has been questioned,[19] this case is not in a pleading or preliminary

[18] Plaintiffs' counsel has tentatively estimated that trial time alone will amount to well over 300 hours. Defendant considers this estimate optimistic.

[19] See *Gottesman* v. *Gen. Motors Corp.*, 268 F. 2d 194 (2d Cir. 1959); *Brown* v. *Bullock*, 294 F. 2d 415, 422 (2d Cir. 1961) (concurring opinion of Clark, J.); *Atlantic City Elec. Co.* v. *A. B. Chance Co.*, *supra*.

stage. Liability has been determined after a full hearing. What remains is the issue of damages. Should the Court of Appeals rule against plaintiffs, the litigation will be finally concluded. Plaintiffs will not be free to amend the complaint, and thus get a further trial. If the court rules in favor of plaintiffs, the possibility that the case will again come before the Court of Appeals from determinations as to damages, although not foreclosed, will be substantially lessened. And, more importantly, the interlocutory appeal will have avoided a considerable hardship to the parties, particularly the plaintiffs, as well as a heavy preemption of judicial service and court facilities for what can be described as a series of related trials that may ultimately prove to have been unnecessary.[20]

An interlocutory judgment in favor of plaintiffs is filed herewith. The judgment contains a certification for an interlocutory appeal on the question of defendant's liability.

Dated: New York, N. Y.
April 4, 1963

EDMUND L. PALMIERI
U. S. D. J.

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[20] See *Gottesman* v. *Gen. Motors Corp.*, *supra*, at 198-99 (dissenting opinion of Moore, J.). In connection with his comment on the applicability of the interlocutory appeals section to cases in which "a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action," Judge Moore pointed out:

> Certainly it will be too late so far as time and expense are concerned at the end of any hearing on the merits to determine that the plaintiffs had no right to bring this action.

Opinion of the United States Court of Appeals for the Second Circuit, Dated January 29, 1964.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 87 and 88—September Term, 1963.

(Argued October 25, 1963 Decided January 29, 1964.)

Docket Nos. 28276-28277

OLGA ZDANOK, *et al.*,
Plaintiffs-Appellees,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,
Defendant-Appellant.

FRANK T. ALEXANDER, *et al.*,
Plaintiffs-Appellees,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,

WATERMAN and FRIENDLY, *Circuit Judges*.

Defendant appeals pursuant to 28 U. S. C. § 1292(b) from a judgment of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, 216 F. Supp. 476, denying its motion to dismiss the complaints in two consolidated actions and granting plaintiffs' motion for judgment on the issue of liability. Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit, dated January 29, 1964.

FRANK S. HEATH (JONES, DAY, COCKLEY & REAVIS, Cleveland, Ohio) (PATRICK F. MCCARTAN, of Counsel), for Defendant-Appellant.

WHITE & CASE, NEW YORK, NEW YORK (CHESTER BORDEAU AND CHARLES F. G. RAIKES, of Counsel), on brief for Defendant-Appellant.

MORRIS SHAPIRO (SAHN, SHAPIRO & EPSTEIN, NEW YORK, NEW YORK) (HARRY KATZ, of Counsel), for Plaintiffs-Appellees.

FRIENDLY, Circuit Judge:

The much litigated and discussed case of *Zdanok* v. *The Glidden Company*,[1] is back with us, along with a companion case, *Alexander* v. *The Glidden Company*, after further proceedings in the District Court. The actions grow out of a contract effective for two years from December 1, 1955, between Glidden and a local of the General Warehousemen's Union (hereafter the Union) representing production, maintenance and service employees at the Elmhurst, L. I., plant of Glidden's Durkee Famous Foods Division. We are invited by Glidden, indeed strongly pressed, to reconsider our decision, 288 F. 2d 99, in which we construed this contract as entitling the Elmhurst employees to seniority in opportunity for employment at a new plant at Bethlehem, Pa., to which Glidden transferred a considerable part of the Elmhurst machinery

[1] For the history, see opinion dismissing complaint, 185 F. Supp. 441 (S. D. N. Y. 1960), reversed by a divided court, 288 F. 2d 99 (2 Cir. 1961), petitions for rehearing and rehearing *in banc* unanimously denied, cert. granted on the limited issue of the participation of a judge of the Court of Claims, 368 U. S. 814 (1961), affirmed on that issue, 370 U. S. 530 (1962), petition for rehearing (including rehearing of the denial of certiorari on the merits) denied, 371 U. S. 854 (1962), opinion here under appeal, 216 F. Supp. 476 (S. D. N. Y. 1963). Some of the literature provoked by our decision in 288 F. 2d 99 is catalogued in footnote 11.

and work when the contract expired. Glidden extends the invitation on the grounds of alleged new law and of new evidence. We must decline it so far as these cases are concerned.

What we previously had before us was a complaint of Olga Zdanok and four other former Elmhurst employees, brought in the Supreme Court of New York for New York County and removed by Glidden, on the basis of diverse citizenship, to the District Court for the Southern District of New York, where Judge Palmieri found against the plaintiffs on the merits. In an opinion by Judge Madden of the Court of Claims with Judge Waterman concurring and Chief Judge Lumbard dissenting, we held that the plaintiffs were entitled by the contract "to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant" and to recover the damages caused by Glidden's refusal to recognize that entitlement; we remanded the case to the District Court to determine what these damages were. The Supreme Court's refusal to review our decision save as to the legality of participation therein by a judge of the Court of Claims, 368 U. S. 814 (1961), and its approval of such participation, 370 U. S. 530 (1962), left our ruling in effect.

There had also been brought in the Supreme Court for New York County an action against Glidden in which Frank T. Alexander and a large number of other employees at the Elmhurst plant sought relief similar to that asked by the five plaintiffs in the *Zdanok* action. The *Alexander* action was not removed; it remained quiescent while the *Zdanok* case took its way up to the Supreme Court of the United States. On June 26, 1962, the day after that Court's decision, Alexander *et al.* filed in the District Court for the Southern District of New York a complaint, alleging diversity of citizenship, substantially identical with that in the *Zdanok* case. The state court action was discontinued

by stipulation. Counsel for both sets of plaintiffs moved for consolidation of the *Zdanok* and *Alexander* actions pursuant to F. R. Civ. Proc. 42(a), for summary judgment on the issue of liability under F. R. Civ. Proc. 56, and for an order directing assessment of damages, this to be done before a Special Master under F. R. Civ. Proc. 53. On December 28, 1962, Judge Palmieri granted the motion for consolidation and reserved decision on the remaining items.

After a pre-trial hearing where it was agreed to postpone consideration of the proof of the willingness and ability of individual plaintiffs to work at Bethlehem, of the effect on the rights of certain plaintiffs of discharge, resignation and retirement, and of the damages suffered, the parties proceeded to a trial before Judge Palmieri. Plaintiffs' counsel called two witnesses: Katz, an attorney, presented a survey showing the length of service of the plaintiffs and the rights they had or had not attained under Glidden's pension plan when the Elmhurst plant closed. Wiemann, a plaintiff in the *Alexander* action, the only Elmhurst employee who was later employed at Bethlehem, testified that he was hired there "to work at a reduced rate and start as a new man," after unsuccessful efforts to obtain employment in New York. After Wiemann had been cross-examined, plaintiffs rested, their counsel referring to the pre-trial understanding indicated above. Counsel for Glidden then moved to dismiss, arguing that this court had erroneously assumed the issue of the construction of the contract to be one of state law whereas federal law, held by *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), to be applicable in such a case, demanded a different result. Judge Palmieri denied the motion, stating it to be his "firm belief . . . that this case should be thoroughly, adequately and finally tried, so that if and when it goes up to an appellate court of [sic] the second time it need not come back to the trial court." He added "It may be that some of the evidence to be received before this Court will prove ulti-

mately to be unnecessary, but I prefer to have a record that is too full than one that is inadequate."

Glidden then called Weeks, its vice president in charge of personnel, who testified to two matters of importance: One was that in 1956 Glidden transferred certain operations then being conducted at Elmhurst to Louisville, Ky.; that approximately 40 Elmhurst employees were laid off as a result; but that no claim was made that any employees were entitled to transfer to Louisville.[2] The other concerned discussions as to the Elmhurst shut-down, including employment opportunities and severance pay, beginning about March, 1957. Weeks testified that, at a meeting in June, Crotty, the Union's representative, "wanted to know if we wouldn't give some kind of seniority" at Bethlehem, but Weeks took the position that this would be something to discuss with the union there. The meeting was followed by a letter of July 9, 1957, in which Hoppman, counsel for the Union, noted that "the Union has formally requested that the Company enter into negotiations pertaining to a severance pay allowance for these employees and has requested the Company to give these employees first option on employment at its new plant in Pennsylvania"; the letter made reference to "the legal rights of the Union to insist upon negotiations with respect to severance pay."[3]

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[2] Plaintiffs sought to lessen the force of this by bringing out that some 30 of the 40 employees had enough seniority to transfer to other Elmhurst operations. Glidden countered that 10 of the 40 employees did lose their jobs and that the transfer of the 30 affected the jobs of others who were also covered by the instant contract. No records were produced.

[3] Glidden emphasizes the contrast between the assertion as to "legal rights" to insist on negotiations for severance pay, as to which the contract was altogether silent, and the mere request for seniority. Plaintiffs' brief seeks to account for this on the basis that "In light of defendant's refusal to recognize those [seniority] rights, the demand for severance pay, in a form to be agreed upon, represented in actuality a proposal to settle their claim for damages."

Weeks then testified as to a meeting early in August where, after Hoppman and Crotty urged a grant of severance pay which Weeks refused, "Mr. Hoppman also brought up this question of seniority and requested we grant some seniority or preference to employees who might go to Bethlehem. He did not indicate there was any claim under the contract; in fact, he said there wasn't, as Mr. Crotty also told me that there was nothing under the contract that would require us to do it, but he thought we ought to give some consideration to the people who went to Bethlehem." Glidden's other witness, Groves, testified concerning the 1957 discussions to much the same effect as Weeks, whom he had served as assistant. In his testimony as to the August meeting, he went only so far as to say, on the crucial point, that the union representatives made no statement "that under the collective-bargaining agreement the employees had any right to go to Bethlehem," but he gave evidence as to a later meeting, not attended by Weeks, where Crotty's assistant, Makowski, "stated that they had been advised by their counsel that they had no right to employment opportunities at Bethlehem or to severance pay but they wished the company to negotiate on these provisions . . ."[4] Glidden also sought to elicit from Groves testimony as to the negotiations for the 1955 contract and for a predecessor of 1953. On objection, the judge admitted evidence only as to the later contract. The testimony was that in the 1955 negotiations Glidden had advised Crotty that the continuing increase in labor costs at Elmhurst threatened the continuance of that operation, whereupon Crotty added to the Union's wage demands one for severance pay, which was refused. An offer of proof with respect to the 1953 negotiations was of the same tenor, alleging additionally a state-

[4] Plaintiffs placed in evidence the Union's notice of intention to arbitrate, dated October 23, 1957, in which seniority rights at Bethlehem were formally claimed; they did not call Crotty, Hoppman or Makowski.

ment by Crotty "that the Union recognized the possibility of shutdown of the Elmhurst plant, transfer of its operations and termination of employees at Elmhurst, and that the Union intended to 'get it while the getting was good.' "

The district judge said in his opinion, 216 F. Supp. at 480, that "On the evidence that was adduced before it, this Court finds that the parties entertained no expectation that the employees' rights would survive the removal of the Elmhurst plant to another state." Believing that "The Court of Appeals, however, has taken a different view on the basis of the contract itself and the implications to be drawn from its terms," he concluded that he was "bound by the Court of Appeals' interpretation notwithstanding the import of the evidence referred to." Noting defendant's "desire to take an immediate appeal from an adverse ruling on the question of liability," he made the certificate specified in 28 U. S. C. §1292(b); we granted Glidden's timely motion for leave to appeal.

It will be convenient to begin by discussing the *Zdanok* action which was previously before us, and to consider the *Alexander* action in the light of the conclusions reached in respect of *Zdanok*.

The Zdanok Action

As indicated at the outset, Glidden's contention that we should now reach a different result as to its liability rests both on the testimony offered or sought to be offered through Weeks and Groves (as well as the inference from plaintiff's failure to contradict the testimony that was admitted) and on new light as to the governing rule of law.

We can dispose of the first contention rather readily—the district court had no power to consider the testimony on which Glidden relies. The *Zdanok* case was tried in 1960

on the issue of liability as fully as the parties wished.[5] Nothing in this court's opinion gives the slightest support to any idea that it considered itself to be dealing with an issue but partially tried, in which Glidden possessed evidence helpful to its cause but not yet presented; nor did Glidden's briefs here, or even its petition to the Supreme Court for certiorari, at all suggest this. We ruled "that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant" and that "The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has

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[5] At the outset of the first trial plaintiffs' counsel announced that "in accordance with the suggestion made when this case first appeared on the calendar, we are prepared today to go forward with the reading of a statement which was made by the defendant and received by the plaintiffs in lieu of a deposition before trial, and at the conclusion of the reading of that deposition, to rest except for proof of damages, and at that time it was my understanding that there would be a motion to dismiss; that your Honor would rule on the question as to whether there was liability on the part of the defendant; that if your Honor held there was liability, we would then go forward before a jury with proof on the question of damage. On the other hand, if your Honor ruled that there was no liability on the part of the defendant, there would be a dismissal of the complaint." Counsel for defendant pronounced this satisfactory. Plaintiffs' counsel proceeded to read a portion of the statement (including a reference to the discontinuance of various operations at Elmhurst and their transfer to Louisville in 1956, of which the District Court's first opinion took cognizance, *supra*, 185 F. Supp. 441, 448, fn. 28), and rested. Defendant's counsel then offered the omitted portion; this was received over plaintiffs' objection. Thereupon defendant rested and moved to dismiss. The plan of plaintiffs' going to a jury on the issue of damages "if your Honor held there was liability" on the evidence presented, and Glidden's statement that it rested, are wholly inconsistent with the view that Glidden's motion was addressed only to the evidence presented up to that point, reserving the right to introduce extrinsic evidence on interpretation if the court was not convinced in its favor by what had been submitted. Plaintiffs, of course, were equally precluded from offering further evidence.

caused them"; our ruling was not that all this might be so unless defendant came forward with evidence supporting a different reading of the contract. We remanded for the district court to go into the issue which, by agreement, had been left undetermined at the first trial—whether plaintiffs could establish damages from defendant's breach and, if so, how much. Without leave from this court the district court could not lawfully consider further evidence on the issue of liability. *In re Potts & Co.*, 166 U. S. 263 (1897), contrasting *In re Sanford Fork & Tool Co.*, 160 U. S. 247 (1895). So far as the *Zdanok* action is concerned, we need not discuss plaintiffs' alleged failure to object to the introduction of some of the evidence; the question goes to the power of the district court to receive it. *Thornton* v. *Carter*, 109 F. 2d 316, 321 (8 Cir. 1940).[6]

Glidden's contention as to a change in the governing law requires more discussion. Its argument can be summed up in three propositions: (1) When the case was previously here, the majority regarded the issue of the construction of the contract as one of New York law; (2) Subsequent decisions of the Supreme Court show that the construction of the contract is determinable by federal law; (3) Under federal law our previous construction was wrong.

We immediately accept the second proposition. *Smith* v. *Evening News Ass'n*, *supra*, 371 U. S. at 199-201. As to the first proposition, although, for reasons indicated in the margin,[7] we find no convincing evidence whether the

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[6] No different conclusion follows from the consolidation of the *Zdanok* with the *Alexander* action. Consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* v. *Manhattan Ry.*, 289 U. S. 479, 496-97 (1933). If the situation were otherwise, the consolidation order would have to be disregarded as in violation of the mandate.

[7] The only explicit statement was by Chief Judge Lumbard who said, in dissent, that "the contract should be construed in light of federal substantive law pursuant to §301 of the Labor Management Relations Act, 1947, 29 U. S. C. §185." The majority's disagree-

majority on the previous appeal considered the issue to be "a question of state contract law," 370 U. S. at 537, we accept Mr. Justice Harlan's statement that they did.[8] We agree with appellant that if, before a case in a district court has proceeded to final judgment, a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principle of "the law of the case" would warrant a failure on our part to correct the ruling.[9] We shall further assume in appellant's favor that

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ment with Chief Judge Lumbard on the meaning of the contract did not necessarily involve disagreement as to the source of governing law. The briefs cited federal and New York decisions interchangeably; although the majority devoted some discussion to a New York decision, *Parker v. Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959), that was because it had been heavily relied on by Glidden; and it was not germane to the central issue in any event. Glidden's petition for certiorari (pp. 10-18) claimed that the issue was one of federal law on which this Court's decision was in conflict with those of other circuits, but did not contend that we had considered the issue to be one of state law. That view seems to have originated in respondents' brief opposing the petition, p. 9; the theory was that since *Zdanok* was an action to sustain individual rights of employees, the decision in *Association of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U. S. 437 (1955), which the Supreme Court had not yet formally repudiated, called for application of state law.

[8] The statement was not material to the question before the Supreme Court; the issue as to the legality of Judge Madden's participation would have been precisely the same if his opinion had plainly said that the construction of the contract was to be determined by federal law.

[9] The reason, as stated in *White v. Higgins*, 146 F. 2d 312, 317 (1 Cir. 1940), is that "Our [a court of appeals'] law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case." The latter statement finds support in *Panama R. R. v. Napier Shipping Co.*, 166 U. S. 280, 283-84 (1897); *Messenger v. Anderson*, 225 U. S. 436, 444 (1912); and *Reece v. Georgia*, 350 U. S. 85, 87 (1955). See also *Peterson v. John Hancock Mut. Life Ins. Co.*, 116 F. 2d 148 (8 Cir. 1940).

this is true in the extraordinary circumstances here, where the Supreme Court, having granted certiorari on a limited issue, expressly affirmed our judgment. 370 U. S. at 585. Compare *City of Indianapolis* v. *Chase Nat'l Bank*, 314 U. S. 63 (1941).

It is appellant's third proposition that fails. Knowledge that Glidden's contract is to be construed according to federal rather than state law does not mean that the construction previously given by the majority in this court was wrong. Federal law and New York law are alike in that a court's job in interpreting a contract is to ascertain what the parties meant by the words they used. Indeed, "state law, if compatible with the purpose of §301 [of the Labor-Management Relations Act], may be resorted to in order to find the rule that will best effectuate the federal policy," although any state law so applied "will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957). The two areas where federal law and New York law on the interpretation of labor contracts might differ would be in greater federal deference to the policy of federal labor statutes or even to "the penumbra of express statutory mandates," *ibid.*, and in the relative weight that courts in one system would give to decisions, not binding upon them, of other courts in the same system as compared with those of courts in the other system.

Glidden seeks to bring itself within both possibilities. It calls attention to decisions under the National Labor Relations Act that an advance agreement to give recognition at a contemplated new location to a union representing a majority of the employees at an existing location may constitute an unfair labor practice. *Chicago Freight Car & Parts Co.*, 83 NLRB 1163 (1949); *NLRB* v. *Masters-Lake Success, Inc.*, 287 F. 2d 35 (2 Cir. 1961), enforcing 124 NLRB 580 (1959). But these decisions, resting on the agreement's unlawful interference in the selection of a

bargaining representative, do not say that a contract whereby an employer undertook to recognize existing seniority in hiring at a new plant would constitute an unfair labor practice, or that an employer who had so contracted would commit an infraction by refusing to violate his commitment in a bargain with the duly chosen representative at the new location. As to federal decisions, in addition to citing the same cases on which it relied three years ago, *System Federation No. 59* v. *Louisiana & A. Ry.*, 119 F. 2d 509 (5 Cir.), cert. denied 314 U. S. 656 (1941); *Elder* v. *New York Central R. R.*, 152 F. 2d 361 (6 Cir. 1945); and *Local Lodge No. 2040, I. A. M.* v. *Servel, Inc.*, 268 F. 2d 692 (7 Cir.), cert. denied, 361 U. S. 884 (1959), which are distinguishable, Glidden stresses *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (6 Cir.), cert. denied, 371 U. S. 941 (1962), which is not fairly so despite the Sixth Circuit's politeness in calling Glidden's agreement "materially different." 305 F. 2d at 149. But this single decision by a sister court of appeals scarcely creates a *corpus* of federal law showing our previous ruling to be erroneous.[10] What the *Oddie* ruling does create, particularly when it is superimposed on Chief Judge Lumbard's earlier dissent here and the great amount of critical discussion in the law reviews that our decision has engendered,[11] is doubt whether, if other similar contracts

[10] The Supreme Court's expressed belief that our ruling rested on state law deprives the denial of certiorari in *Oddie* of whatever small significance it might otherwise have had. Supreme Court Rule 19(b).

[11] The following is a partial listing of these comments, some favorable and others unfavorable:

Articles:

Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962);

Blumrosen, Seniority Rights and Industrial Change: Zdanok v. Glidden Co., 47 Minn. L. Rev. 505 (1962);

Burstein, Subcontracting and Plant Removals, 13 Lab. L. J. 405 (1962);

should come before us for construction, we ought follow the lead of our divided decision in this case or of the unanimous contrary one of the Sixth Circuit in *Oddie*. This is precisely the situation in which "the law of the case" is decisive; in Judge Magruder's words, "mere doubt on our part is not enough to open up the point for full reconsideration." *White* v. *Higgins*, 116 F. 2d 312, 317 (1 Cir. 1940).

Daykin, Runaway Shops: The Problem and Treatment, 12 Lab. L. J. 1025 (1961);

Feinberg, Do Contract Rights Vest? Proceedings of the Sixteenth Annual Meeting, National Acad. of Arbitrators 192 (1963);

Lowden, Jr., Survival of Seniority Rights Under Collective Agreements: *Zdanok* v. *Glidden Co.*, 48 Va. L. Rev. 291 (1962);

Turner, Plant Removals and Related Problems, 13 Lab. L. J. 907 (1962).

Notes:

Seniority Rights Held to Survive Termination of Collective Bargaining Agreement and Relocation of Plant, 61 Colum. L. Rev. 1363 (1961);

Plant Removal and the Survival of Seniority Rights: The Glidden Case, 37 Ind. L. J. 380 (1962);

Industrial Mobility and Survival of Seniority—What Price Security?, 36 So. Cal. L. Rev. 269 (1963);

Seniority Rights Survive the Termination of the Collective Bargaining Agreement, 40 Texas L. Rev. 721 (1962);

Seniority Survival: *A New Doctrine of Uncertain Prospects*, 9 U. C. L. A. L. Rev. 469 (1962);

Seniority Rights Held to Survive Termination of Contract and to be Transferable to Employer's New Plant, 110 U. Pa. L. Rev. 458 (1962);

Seniority—Whether Rights Survive the Collective Bargaining Agreement, 1962 Wis. L. Rev. 520.

Panel Discussions:

Plant Removals and Related Problems, 13 Lab. L. J. 914 (1962);

Employer's Right to Relocate vis-a-vis Labor, 19 N. Y. County Bar Bull. 145 (1962);

Plant Removals and Subcontracting of Work, 14 Lab. L. J. 366 (1963).

It is true enough that, as said by Judge Learned Hand, "the 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense." *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F. 2d 896, 898 (2 Cir. 1924). It is true also that one of the bases for the principle, the desire to save judicial time, is not too persuasive when, as here, an overruling of our previous decision might well bring "the case" to a much quicker end than it will otherwise have, and it seems not unlikely that we may be required to face the same issue with respect to some other contract of similar ambiguity. But another consideration is applicable: where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again. Perhaps the "good sense" of which Judge Hand spoke comes down to a calculus of the relative unseemliness of a court's altering a legal ruling as to the same litigants, with the danger that this may reflect only a change in the membership of the tribunal, and of its applying one rule to one pair of litigants but a different one to another pair identically situated. This explains why a clear conviction of error on a point of law that is certain to recur, as in this court's well-known decision in *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878, 886 (2 Cir. 1919),[12] will prevail over "the law of the case" whereas "mere doubt" will not. In the former instance the court knows that later litigants will be governed by a different rule; in the latter that is only a possibility. We hold *Zdanok* to be governed by our previous decision.

The Alexander Action

Despite the difference in parties plaintiff, we would entertain no doubt that the construction of the contract an-

[12] See Cardozo, The Nature of the Judicial Process 158-60 (1921 ed.); 1A Moore, Federal Practice ¶0.404[2] (1961).

nounced in the appeal in the *Zdanok* action, to which we adhere in that action, ought be applied in the *Alexander* action also, if "the case" remained the same in other respects. Since the doctrine of the law of the case is addressed to the court's "good sense," we see no reason why it should be peremptorily excluded because of the presence of new parties when the party against whom it is invoked was fully heard on a prior appeal, any more than that it must be rigidly applied whenever the parties remain the same. The construction of a contract has long been recognized as the type of issue "that is particularly vulnerable to law of the case." Note, Law of the Case, 5 Stanford L. Rev. 751, 759 (1953), citing *Leese* v. *Clark*, 20 Cal. 387, 418 (1862). Glidden was given the opportunity to make its argument on the construction of the contract and took full advantage of it. While the Alexander plaintiffs were not parties to the *Zdanok* action, it is clear that everyone expected their rights to be governed by the court's interpretation of the contract in that test case.[13] Thus for the purpose of holding Glidden to the law of *its* case, we would see no unfairness in proceeding as if the Alexander plaintiffs had been parties to an action which was expected to settle their rights—again assuming that "the case" was still the same.

This brings us to Glidden's argument that because of the additional evidence, which, it urges, was surely received with propriety in the *Alexander* action, the latter was not the same "case" as that on which we previously ruled.

The new testimony does not have the strong impact upon a majority of us that it did upon the district judge. The evidence with respect to the transfer of certain Elmhurst operations to Louisville in 1956 was not carried through

[13] At the close of the trial before Judge Palmieri in May, 1960, plaintiffs' counsel remarked, "I think this case is indeed an important one. . . . This case is a test case affecting five employees but actually affecting 160-odd employees of this plant."

to the point where it would be truly convincing, see fn. 2; indeed, plaintiffs argue with some force that Glidden's failure to produce its records on this subject warrants the inference that the claim was not supportable. When the testimony as to the admission in 1957 that the seniority provisions did not cover the move to Bethlehem is read as a whole, we get the impression that this primarily reflected the legal views of the Union's lawyer. This is not very probative since there is no evidence that he had particular knowledge of the background of the contract—indeed, the record shows that he did not participate in the negotiations of either 1955 or 1953. The Union's repeated unsuccessful demands for severance pay do not lead to the inference of its consciousness of the limited effect of the seniority clauses with anything like the inevitability that Glidden contends. Severance pay, available to all the Elmhurst employees, was a quite different and much more attractive proposition to the Union than seniority rights that would help only those employees who would be willing to move their lares and penates to a destination which in 1953 and 1955 was not even known. The Union thus might perfectly well have sought severance pay in 1953 and 1955 even though it believed the contract protected seniority rights on a transfer, and surely might have preferred a settlement on that basis in 1957 to what it then knew would be a controversy on that subject. Still, with the issue of construction of the contract such a close one, we cannot be sure that the evidence now offered by Glidden and the inference from plaintiffs' failure to rebut it might not have tipped the scales on the prior appeal or be decisive in this one if properly before us. But we hold that in the *Alexander* action also the new evidence should not be considered.

The reason for this lies in the principle somewhat undescriptively called "collateral estoppel"; we hold that the ruling of liability in the *Zdanok* case precluded Glidden from offering new evidence to contest this not only against

the five original plaintiffs but against the Alexander group as well. We recognize that such a holding would have seemed impossible fifty years ago: If in the *Zdanok* action the contract were construed as Glidden contends, this would not preclude the Alexander plaintiffs from offering extrinsic evidence to support their construction of the contract, since they had not had their day in court. Because it was thought that estoppels must be "mutual," that "Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary,"[14] Glidden would likewise not be precluded from offering new evidence against the Alexander group.

This doctrine of the need for mutuality of estoppels, criticized by Bentham over a century ago as destitute of any semblance of reason, and as "a maxim which one would suppose to have found its way from the gaming-table to the bench," *ibid.* fn. 14, has been much eroded in recent years. Perhaps the leading federal decision is Judge Hastie's in *Bruszewski* v. *United States*, 181 F. 2d 419 (3 Cir.), cert. denied, 340 U. S. 865 (1950), which this court followed in *Adrioanse* v. *United States*, 184 F. 2d 968 (2 Cir. 1950), cert. denied 340 U. S. 932 (1951). We see no purpose in multiplying citations since it is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 811-13, 122 P. 2d 892, 894-95 (Calif. 1942).[15] Having explained why "The criteria for determining who may assert a plea of res judicata differ fundamen-

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[14] Bentham, Rationale of Judicial Evidence, in 7 Works of Jeremy Bentham 171 (Bovring ed. 1843), quoted in Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281, 284 fn. 6 (1957).

[15] On its facts the *Bernhard* case would seem to have come within a long recognized exception to the requirement of privity—namely, that a judgment in favor of an indemnitor precludes a later action against an indemnitee. American Law Institute, Restatement of Judgments, §96(a); *Good Health Dairy* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758 (1937); Currie, *supra*, 9 Stan. L. Rev. 2[illegible] fn. 22.

tally from the criteria for determining against whom a plea of res judicata may be asserted," and that there is "no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier ligation," he said:

> "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

The statement of the second of these criteria suggests an obstacle to the Alexander plaintiffs' invoking the ruling as to liability in *Zdanok*, namely, that there has yet been no final judgment on the merits in that case. But we see no reason why in an appropriate case a ruling that is final on the issue of liability should not preclude the party against whom the decision ran from presenting further evidence on the issue there finally determined. Dealing with this very question of the kind of finality of judgment necessary to create an estoppel, we pointed out, quite recently, that collateral estoppel does not require a judgment "which ends the litigation . . . and leaves nothing for the court to do but execute the judgment," *Catlin* v. *United States*, 324 U. S. 229, 233 (1945), but includes many dispositions which, though not final in that sense, have nevertheless been fully litigated. *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80, 89 (2 Cir. 1961), cert. denied, 368 U. S. 986 (1962), and cases cited. As we there said, " 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." We meant our previous ruling to be final on the hotly contested issue of liability under Glidden's contract

with its employees, the Supreme Court affirmed this, and we have now affirmed it again. The mere fact that the damages of the *Zdanok* plaintiffs have not yet been assessed should not deprive that ruling of any effect as collateral estoppel it would otherwise have. It was simply a matter of procedural convenience that caused the district court to consolidate the *Zdanok* and *Alexander* actions, rather than allow the *Zdanok* action to go first to the final judgment to which, in the absence of Supreme Court review, it now shortly must.

A more serious question is whether the *Bernhard* criteria should be applied so generally in favor of persons not parties or privies to the earlier judgment as that opinion stated. A penetrating article by Professor Brainerd Currie, cited in fn. 14, while heartily approving what had been decided in *Bernhard* and most of what was said there, suggested the opinion had stated the principle too broadly. He distinguishes between a stranger's "defensive" use of a prior judgment which he thinks proper regardless of mutuality, and "offensive" use, which he thinks generally improper in the absence of mutuality. The evils of such "offensive" use are illustrated by the case of a railroad accident injuring 50 people who bring separate successive actions. The railroad can achieve no benefit in future actions from successful defense of the first 20. Yet, under the letter of the *Bernhard* opinion, a loss in the 21st round, perhaps resulting from a jury compromise out of sympathy for an appealing plaintiff, would bind the railroad for the remaining 29. Currie's understandable belief that something was wrong in that picture proved persuasive to a district court of appeal in California which, citing his article, refused to allow other persons injured in an automobile collision to avail themselves of a prior plaintiff's judgment, *Nevarov* v. *Caldwell*, 327 P. 2d 111 (1958), and the California Supreme Court denied hearing, Justice Carter alone dis-

senting, 327 P. 2d at 122. New York also takes this view. *Elder* v. *New York & P. Motor Express, Inc.*, 284 N. Y. 350, 31 N. E. 2d 188 (1940). Contrast *United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709, 725 (D. Nev. 1962) [judgment against airline in consolidated cases of 24 plaintiffs after 15 week trial held conclusive—but airline indicated it had no additional evidence].

We find the instant case to be fairly distinguishable from the California and New York decisions just cited and to warrant application of the *Bernhard* principle. Professor Currie recognizes that his "offensive-defensive" distinction is simply a rule of thumb that will usually achieve the right result, and concludes, *supra*, 9 Stan. L. Rev. at 308, that the abandonment of the mutuality requirement is sound except (1) "where the result would be to create an anomaly such as would occur in the railroad type of situation, where the party against whom the plea is asserted faces more than two successive actions," or (2) where "by reason of his former adversary's possession of the initiative," he has not "had a full and fair opportunity to litigate the issue effectively." Here Glidden's opportunity to litigate the *Zdanok* case was both full and fair. New York was an entirely reasonable forum for litigation of a contract made in New York with respect to residents of New York working in a New York plant; as between state and federal courts in New York, Glidden, in the *Zdanok* case, had the forum of its choice. Although the plaintiffs are numerous, and could conceivably, by careful timing of their complaints, have subjected Glidden to such a series of actions as posed in Professor Currie's railroad case, such a course offers little advantage where the matter in issue is not a factual question of negligence subject to the varying appraisals of the facts by different juries, but the construction of a written contract by a judge. Needless to say, nothing in the result of *Zdanok* turned on personal sym-

pathy or any other consideration relating specifically to those five plaintiffs as distinguished from the other employees. And Glidden cannot reasonably argue that it was unfairly surprised by the entry of the Alexander plaintiffs into the lists after judgment in *Zdanok* or that it would have defended more diligently if the two actions had been combined from the outset. The *Zdanok* litigation was prosecuted by Glidden with the utmost vigor, up to the Supreme Court of the United States. The *Alexander* action in the state court was known by everyone to be lurking in the wings; it was mentioned in Glidden's brief in this court, p. 2, in its petition for rehearing, p. 3, and in its petition for certiorari, p. 4. Since both the *Zdanok* and *Alexander* actions present questions of federal law, we are free to follow our own conceptions as to the effect of the judgment in the former on the latter, see Currie, *supra*, 9 Stan. L. Rev. at 301, fn. 40, and need not decide whether this would also be true if federal jurisdiction in either or both actions rested on diversity alone. Cf. *Kern* v. *Hettinger*, 303 F. 2d 333, 340 (2 Cir. 1962).

All that remains is Glidden's contention that the plaintiffs made no objection to the receipt of the evidence as to the refinery shut-down or the 1957 discussions and objected to the evidence of the negotiations, so far as concerned the *Alexander* case, only on the ground of materiality. Whatever importance this might have if the party that had failed to object were complaining of the decision, F. R. Civ. Proc. 46, it has none when the attack is by the other party. "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937); see 7 Moore, Federal Practice §72.05 (1955). Beyond that, plaintiffs' motion for summary judgment on the issue of liability had already made "known to the court" their position that further evidence on that issue could not

properly be taken; in that sense defendant's entire evidentiary presentation was over plaintiffs' objection.

The interlocutory judgment denying defendant's motion to dismiss the complaint, granting plaintiff's motion for judgment on the issue of liability, and directing the ascertainment of damages is affirmed.

LUMBARD, Chief Judge (concurring):

I concur in affirmance of the interlocutory judgment of the district court.

Although the record is not very clear, it seems fair to conclude that at the first trial of the *Zdanok* action before the district court the defendant had full opportunity to introduce evidence relating to the contractual intent of the parties. The defendant having elected not to do so, the mandate of this court on the original appeal foreclosed for the district court the issue of liability. Inasmuch as the district court was without power to receive additional evidence relating to the issue of liability, and in light of the fact that absent such new evidence the case returns to us in virtually the same posture as at the time of our prior decision, I feel constrained to acquiesce in the application of the law of the case doctrine.

Were it not the case that the *Alexander* action had been instituted in the New York State Supreme Court some two years before the brief trial of the *Zdanok* action, I should be reluctant to concur in the extention of the collateral estoppel doctrine to encompass the circumstances in *Alexander*. But it is clear that when the defendant elected to rest its case primarily on the terms of the collective bargaining agreement in *Zdanok*—a case involving merely five employees—it was fully aware of the *Alexander* case, then pending in the state court for about two years, which involved some 160 employee-plaintiffs. Were the

circumstances otherwise, I might be persuaded by a claim that the defendant failed to produce the totality of its relevant evidence in *Zdanok* because of the limited recovery which could have been anticipated upon a judgment for only five plaintiffs. But such a position is untenable in the circumstances here.

I should like to point out that, while the law of these specific cases is settled, and with all respect to Judge Madden, a distinguished senior judge of the Court of Claims, the prior decision rendered by this court, 288 F. 2d 99 (1961), in fact represents the views of but one judge of this circuit and is entitled to no precedential value so far as this circuit is concerned. The two judges of this circuit who heard the first appeal were divided on the appropriate disposition of the case.

As for the merits of these cases, whatever substance there may have been in the planitiffs' position on the first appeal, had it been proper for the district court to consider the additional proof adduced by the defendant at the second trial it seems to me to be clear beyond the peradventure of a doubt that the defendant proffered the only tenable view of the collective bargaining agreement. As Judge Palmieri stated: "This Court finds that the parties entertained no expectation that the employees', rights would survive the removal of the Elmhurst plant to another state." It is not for the courts to alter the bargain which the parties themselves have struck.

Thus, unfortunately, the result of this litigation is completely at variance with the intention of the parties. Nonetheless, in light of the sound basis in reason and policy for declining to permit the defendant to introduce new evidence which it could have brought before the district court at the first trial, I reluctantly concur in affirmance of the judgment below.

Opinion of the United States Court of Appeals for the Second Circuit, Dated March 28, 1961.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 217—October Term, 1960.

(Argued February 8, 1961. Decided March 28, 1961.)

Docket No. 26542

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Plaintiffs-Appellants,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,
Defendant-Appellee.

Before:

LUMBARD, Chief Judge,
MADDEN, Judge, United States Court of Claims,*
and WATERMAN, Circuit Judge.

Action by former employees for damages for breach of collective bargaining agreement. The United States District Court for the Southern District of New York, Edmund L. Palmieri, J., held that plaintiffs had no rights to preserve seniority status under the expired collective agreement. 185 F. Supp. 441. Plaintiffs appealed. The Court of Appeals, MADDEN, Judge, United States Court of Claims, held that a state court's decision refusing to compel arbitration was not *res judicata* of plaintiffs' claims, that plaintiffs were entitled individually to enforce their seniority rights

* Sitting by designation.

under the collective agreement, and that plaintiffs' rights under the agreement were violated when their employer deprived them of continued employment with accrued seniority at the employer's new plant location.

Reversed.

MORRIS SHAPIRO, New York, N. Y. (HARRY KATZ, SAHN, SHAPIRO & EPSTEIN, New York, N. Y., on the brief), for plaintiffs-appellants.

CHESTER BORDEAU, New York, N. Y. (CHARLES C. HUMPSTONE, WHITE & CASE, New York, N. Y., on the brief), for defendant-appellee.

MADDEN, Judge:

The plaintiffs sued in the District Court for the Southern District of New York for damages for alleged breach by the defendant of a contract made for their benefit by a labor union. The District Court had jurisdiction because of diversity of citizenship. The Court decided that they were not entitled to recover, 185 F. Supp. 441, and they have appealed.

From 1929 until November 30, 1957, the defendant operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. The plaintiffs are members of General Warehousemen's Union, Local 852, which is affiliated with the Teamsters' Union. The defendant and Local 852 had had collective bargaining agreements since December 1, 1949, each agreement covering a two-year period. The last agreement covered the period December 1, 1955 to November 30, 1957.

Each agreement contained a provision establishing a system of seniority which required that in case of a curtailment of production, employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous

employment, his seniority would entitle him to be reemployed if an opening for reemployment for one having his seniority occurred within three years after his lay-off. If he had had less than five years of employment before his lay-off, he would be entitled to reemployment if an opening for one with his seniority occurred within two years after his lay-off. The contract between the union and the employer contained a non-contributory pension plan, with normal retirement on pension at age 65, early retirement at 55 if the employee had had 15 years of service, and other types of pensions under specified conditions. The contract also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

On September 16, 1957 the defendant gave written notice to the union that it would terminate the collective bargaining contract at its expiration date, November 30, 1957. After September 16 it began to reduce production at Elmhurst, and to remove its machinery and equipment from Elmhurst to a newly established plant at Bethlehem, Pennsylvania. The employment of four of the five plaintiffs was terminated on November 1, and that of the fifth one on November 18. The ages of the five plaintiffs, at the time of their discharge, ranged from 43 to 61 years, and their periods of employment with the defendant ranged from 10 to 25 years.

The defendant removed a considerable part of its machinery from its Elmhurst plant to the new Bethlehem plant, and manufactured there a number of the same products. The Bethlehem plant was more modern and efficient, and apparently had a considerable number of new machines, in addition to the ones moved from Elmhurst. Some of the products formerly made at Elmhurst were, after the closing of that plant, made at the defendant's Louisville plant.

There was work at the Bethlehem plant similar to that done at Elmhurst by three of the plaintiffs. As to the

other two plaintiffs, who were men, aged 43 and 49, their work at Elmhurst was to check merchandise that was loaded or unloaded from trucks leaving or entering that plant. At the Bethlehem plant such duties have been incorporated into other job classifications which specify the employee to load and unload the trucks and to operate an electric walking type lift truck to stack the merchandise in the storage area as well as to check the incoming and outgoing merchandise that the employee loads and unloads. This different Bethlehem work would not seem to have required any skill that could not have been acquired in a short time.

The defendant offered to give fair consideration to applications for employment at its Bethlehem plant, to its former employees at Elmhurst, only if they would come to Bethlehem and make application there on the same basis as new applicants who might seek employment there. Two Elmhurst employees, not plaintiffs herein, made such applications, and their applications were accepted. Only one of them actually went to work. He has been considered as a new employee at Bethlehem, with no seniority carried over from Elmhurst.

The plaintiffs contend that they were, as beneficiaries of the contract between their union and the defendant, entitled to the jobs which were created by the opening of the plant at Bethlehem. They say that they were laid off because of the removal of the machinery and the cessation of operations at Elmhurst, and that as work was opened up at Bethlehem they were entitled, by reason of their seniority and the contract provisions relating to it, to go to work at Bethlehem with the seniority which they had acquired at Elmhurst.

The defendant offers several defenses. We consider first the defense of *res judicata*. That defense was considered and rejected, first by Judge Dimock, on a motion by the defendant for summary judgment and again, after the defendant had filed its answer asserting *res judicata* as an

affimative defense, by Judge Palmieri, in his decision and opinion on the merits of the case.

Local 852, the plaintiffs' union, served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. The defendant made a motion in the Supreme Court of New York to stay arbitration, on the ground that the disputes were not arbitrable under the arbitration provision of the contract. That provision said:

> Any question, grievance or dispute arising out of and involving the interpretation and application *of the specific terms* of this Agreement * * * shall, at the request of either party, be referred to the New York State Mediation Board for Arbitration. (Emphasis supplied.)

The court granted the defendant's motion, on the ground that the subjects sought to be arbitrated were not covered by *the specific terms* of the contract. The court's opinion[1] lays much emphasis on the word *specific* in the agreement to arbitrate and says that "no one is under a duty to resort to arbitration unless by clear language he has so agreed." The court concluded its opinion with this sentence:

> It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes.

The New York court's opinion as a whole, and its concluding paragraph seem to us to show that the court was deciding nothing more than that the arbitration provision, as narrowly written, did not confer jurisdiction upon an arbitration tribunal to adjudicate the disputes in question. If the

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[1] *Matter of General Warehousemen's Union*, 10 Misc. 2d 700, 172 N. Y. S. 2d 678 (1958).

court had decided, as the defendant claims, that the contract as a whole, in its circumstances, and including its fair implications, conferred no rights upon the union or the employees with regard to the asserted disputes, the court's concluding paragraph defies understanding.

The defendant also contends that because the collective bargainjng agreements contained provisions for the arbitration of disputes, the plaintiffs are not entitled to individually enforce their rights under the agreement. The defendant relies heavily upon *Parker* v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959), as support for its contention that the plaintiffs individually are not entitled to enforce the rights which they claim here. In the *Parker* case, the plaintiff had been discharged "for cause." He invoked the grievance procedure of the collective bargaining agreement between his union and employer. He was not reinstated, and the union refused his request to seek arbitration. He thereupon moved in the United States District Court to compel the employer to arbitrate his discharge. The motion was denied.

The plaintiff then sued in the New York state courts for money damages for breach of the collective agreement, asserting that the employer did not have "cause" to discharge him. The defendant moved for a stay pending arbitration, but its motion was denied on the ground that only the employer or the union, and not an employee, could seek a submission to arbitration. The defendant then moved for summary judgment. The New York Supreme Court denied the motion, but the Appellate Division's reversal, granting the motion, was affirmed by the Court of Appeals.

The Court of Appeals said, 5 N. Y. 2d at p. 160, 156 N. E. 2d at p. 299, that "the employee is the direct beneficiary" of provisions in a collective agreement prohibiting discharge of an employee except for cause. The court held, however, that the plaintiff, who was also "bound by and limited to the provisions of the agreement," had "entrusted his

rights to his union representative," who alone could have sought arbitration of the plaintiff's discharge. 5 N. Y. 2d at p. 161, 156 N. E. 2d at pp. 299-300. The court noted that the plaintiff's only remedy would be against the union for failing to fulfill its duties under the agreement.

The *Parker* case is, therefore, significantly different from the instant case. In *Parker*, the question which the plaintiff sought to litigate had been entrusted by him, under the collective agreement, to the arbitration process. That was the interpretation which the New York Court of Appeals placed upon the contract there before it. In the instant case, as we have seen, the Supreme Court of New York has held that the dispute with which this suit is concerned is *not* covered by the arbitration provision of the agreement.[2] The plaintiffs have not, therefore, entrusted to their union representative the rights which they now seek to enforce.

As to the merits of the plaintiffs' claims, the defendant takes the bold position that the collective bargaining contract conferred upon the employees no rights which survived the contract. It says, at page 27 of its memorandum:

> Even if the Elmhurst operations had continued but the collective bargaining agreement had expired, the seniority status of plaintiffs would not have survived the termination of that agreement. For it is only by reason of existing provisions in the agreement that provisions relating to the seniority have any application. When such provisions no longer exist, seniority no longer exists.

The defendant may have assumed this bold and uncompromising position because it feels uneasy about Judge Palmieri's having based his decision solely upon the geographical shift of the plaintiff's factory operations. We discuss that problem later herein.

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[2] Matter of General Warehousemen's Union, *supra*.

Opinion of the United States Court of Appeals for the Second Circuit, dated March 28, 1961.

We think the defendant's language, quoted above, is not supportable. Suppose an employee had completed five years of service in October, 1957. Under the seniority provision of the collective bargaining agreement, he thinks that he has earned, and acquired, by continuous service, valuable insurance against unemployment; that by reason of having worked continuously for this company longer than many of his fellow workmen, he could not be laid off unless the lay-off cut deep into the working force; that even if he should be reached in a lay-off, he would be sure to be re-employed if at any time within three years after the lay-off his name should be reached on the seniority list, for re-employment. As we have seen, the defendant's position is that the employee had not acquired any such rights.

Rights embodied in a collective bargaining contract negotiated by a union "inure to the direct benefit of employees and may be the subject of a cause of action." *Parker* v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297-298, citing *Barth* v. *Addie Co.*, 271 N. Y. 31, 2 N. E. 2d 34, and other New York cases. If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right. Nothing of that kind occurred in the instant case.

At the time the Elmhurst employees were discharged, those who had reached the age of 65 and had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15 years of employment with the defendant, are receiving their

retired pay. Those who had 15 years of service and had reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.

We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority. This brings us to the issue which Judge Palmieri in the District Court, found to be the critical issue, i.e., whether the unit to which the employees' rights attached "extend beyond the Elmhurst plant." He held that the rights were not enforceable except in the Elmhurst plant, and therefore denied recovery. With deference, we disagree with this conclusion.

The union contract, in its preamble, recited that it was made by the defendant company

> for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York.

If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise. If the plant moved from 94th Street to 93d Street in Elmhurst, an entire structure of valuable legal rights would tumble down. *A fortiori* if the plant moved to a site a few miles or a good many miles away, the consequence would be the same. But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physcial location. And it would be hard to conjure up a reason why it should. Rather it would seem that the recital in the contract would be analogous to the *descriptio personae* familiar to the law in various situations.

A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam pereat*. If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

In the instant case the plant was, of course, not moved from 94th Street to 93d Street in Elmhurst, nor from Elmhurst to another town within commuting distance of the then residences of the employees. It was moved to a city in another state. That fact does not seem to us to be decisive. It would, of course, have confronted the employees with troublesome problems. They would have had to decide whether the advantages of continued employment with this employer, the right to which they had earned in Elmhurst, were sufficient to induce them to make so considerable a move. It is probable that many of them would not have made the move. Those to whom the defendant had offered employment in Bethlehem, who did not accept the offer, would have, in effect, resigned their seniority and the rights that accompanied continued employment.

We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more

rational, not to say humane, construction of its contract. The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

It follows from what we have said that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them.

The plaintiffs allege in their complaint that they have been "deprived of employment by the defendant," as a result of the defendant's conduct recited above. That is an adequate allegation that they would have accepted employment at Bethlehem if it had been offered to them on the terms to which they were entitled. Proof of this allegation may well fall short of complete conviction, but the trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.

Whatever pension rights would have been earned by employment at Bethlehem, if it had been accepted, must be recognized by the defendant.

Since the case will be remanded, we leave to the District Court consideration of the right of recovery, if any, in

connection with the welfare plan and the group insurance plan which were included in the union agreement.

It appears that the named plaintiff Mary A. Hackett is deceased, and that no motion for substitution has been made. Unless a proper motion is made, the District Court will dismiss the complaint as to that plaintiff.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LUMBARD, Chief Judge (Dissenting):

For the reasons persuasively set forth in Judge Palmeiri's careful and thorough opinion, reported at 185 F. Supp. 441, I would affirm.

It is immaterial to the resolution of the question before us that the employment of competent and satisfactory employees is suddenly terminated, or even that the employer has acted ungenerously, as indeed it has. We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms.

The parties have assumed here that the Supreme Court's decision in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), did not *sub silentio* overrule the distinction between "individual" and "union" rights announced in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Co.*, 348 U. S. 437, 461 (1955). Although the survival of this distinction gives the employees standing personally to assert "individual" rights arising out of a collective-bargaining agreement, *Local Lodge 2040* v. *Servel, Inc.*, 268 F. 2d 692, 696 (7th Cir.), *cert. den.* 361 U. S. 884 (1959), the contract should be construed in light of federal substantive law pursuant to §301 of the Labor Management Relations Act, 29 U. S. C. §185.

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract.

E.g., *Elder* v. *New York Central R.R.*, 152 F. 2d 361, 364 (6th Cir. 1945); see Note, 54 Nw. U. L. Rev. 646, 649-50 (1959). If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective-bargaining agreement. The employees claim, however, that by agreeing to rehire on the basis of seniority for two or three years after layoff, the employer undertook not only to retain seniority rights after the expiration of the agreement but to extend existing seniority privileges to any other location to which the work then done at Elmhurst would be assigned. Relocation of an employer's plant does not, of course, automatically terminate all rights under a collective-bargaining agreement; whether such rights continue depends on the terms of the contract. See *Metal Polishers Local 44* v. *Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960). The issue here is whether this collective-bargaining agreement gave the employees the right to "follow the work" to the new site. I would hold that it did not.

The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforseeable. As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. The consequences of dismissing the plaintiffs' case might indeed be unfortunate and even "catastrophic" from their point of view, but it is hardly "irrational and destructive" for a court to leave the parties as they are if they have never seen fit to provide otherwise.

Judgments of the Court of Appeals, Entered January 29, 1964.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the twenty-ninth day of January, one thousand nine hundred and sixty-four.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge

Hon. STERRY R. WATERMAN
Hon. HENRY J. FRIENDLY

OLGA ZDANOK, *et al.*,
Plaintiffs-Appellees,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,
Defendant-Appellant.

U. S. DISTRICT COURT
FILED
FEB. 17, 1964
S. D. OF N. Y.
Docketed As A
Judgment #66,425
On Feb. 17, 1964
At 2:05 P. M.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

Judgments of the Court of Appeals, entered January 29, 1964.

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Present:

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Chief Judge

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Circuit Judges.

U. S. DISTRICT COURT
FILED FEB. 17, 1964
S. D. OF N. Y.

FRANK T. ALEXANDER, *et al.*,
Plaintiffs-Appellees,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Relevant Statutes.

Section 158(a)(1)(5) of 29 U. S. C. (Labor Management Relations Act, 1947):

"(a) It shall be an unfair labor practice for an employer—

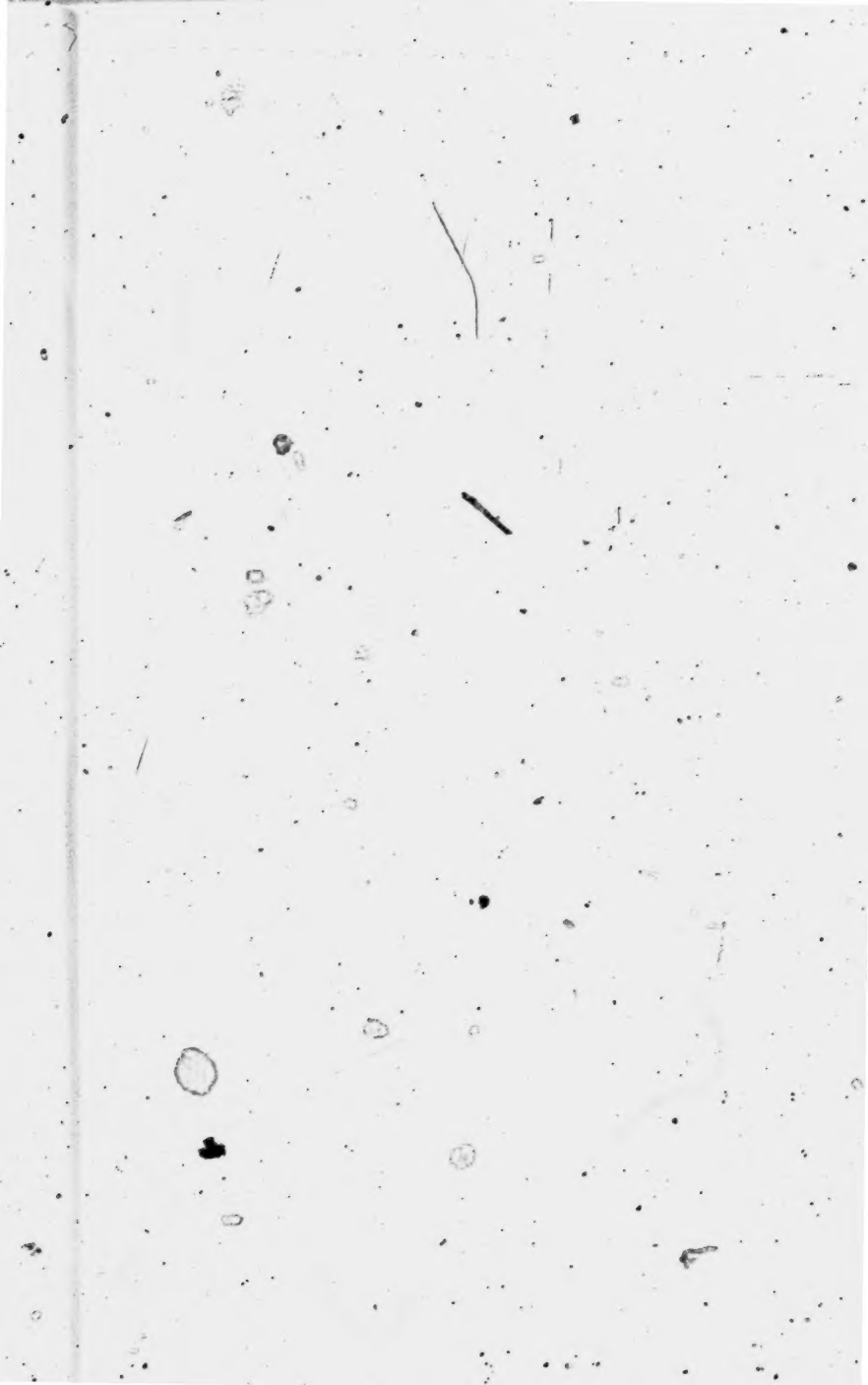
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 185(a) of 29 U. S. C. (Labor Management Relations Act, 1947):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."



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IN THE

Supreme Court of the United States

October Term, 1963

No. 1049

[Consolidated Actions]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

Petitioner,

AGAINST

OLGA ZDANOK, *et al.*,

Respondents.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

Petitioner,

AGAINST

FRANK T. ALEXANDER, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR CERTIORARI

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OCTOBER TERM, 1963

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THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR CERTIORARI

Question Presented

Whether, in an action against petitioner by some former employees for damages for breach of a collective bargaining agreement, which has resulted in final judgment against petitioner on the issue of liability, petitioner may relitigate the same issue in the same action, as well as the same issue under the same agreement in a companion action brought against it by other former employees whose suit had been held in abeyance until the issue of liability in the first action was finally resolved.

Statement

On March 28, 1961 the United States Court of Appeals for the Second Circuit, in *Zdanok* v. *Glidden Co.*, 288 F. 2d 99, reversed a judgment of the District Court after trial, 185 F. Supp. 441 (1960), and held on the merits that petitioner in 1957 had breached a collective bargaining agreement, for which it was answerable in damages, by refusing to afford employment with seniority to employees at its Elmhurst, New York plant upon petitioner's relocation of that plant at Bethlehem, Pennsylvania. Petitions for rehearing and rehearing *in banc* were unanimously denied by the Court of Appeals.

A petition for a writ of certiorari in this Court was granted on the limited issue whether Judge Madden of the Court of Claims could constitutionally participate in the judgment of the Court of Appeals, but the petition was denied on the questions involving the merits, 368 U. S. 814 (1961). Thereafter, this Court affirmed the judgment, 370 U. S. 530 (1962). Petitioner then sought rehearing, including rehearing of the denial of certiorari on the merits, but this petition was denied, 371 U. S. 854 (1962).

On remand, the District Court on respondents' motion consolidated the *Zdanok* action, in which 5 employees are plaintiffs, with the *Alexander* action, an identical action brought by 157 other former employees covered by the same agreement.[1] Decision was reserved on respondents' motion for summary judgment on the issue of liability and for an assessment of damages, and another trial was held. At this trial petitioner offered the testimony of witnesses, who had not testified at the first trial, as to the alleged construction of the agreement by the parties. After this trial the District Court held, 216 F. Supp.

[1] Although petitioner sought to imply in the Court below that the *Alexander* action was an afterthought, having been commenced in the District Court in 1962 after judgment of affirmance was rendered by this Court in *Zdanok*, both the prevailing and concurring opinions in

476 (1963), that it was bound by the Court of Appeals' interpretation of the agreement, and it thereupon granted respondents' motion for summary judgment on the issue of liability and ordered that damages be assessed.

From this judgment petitioner appealed to the Court of Appeals, which affirmed the judgment unanimously, 327 F. 2d 944 (1964). The Court of Appeals held that its first decision in *Zdanok*, construing the collective bargaining agreement here involved and holding that petitioner had breached the agreement, establishes the law of the case and is binding on petitioner in both the *Zdanok* action and the *Alexander* action.

As to the *Zdanok* action, the Court of Appeals held that the issue of liability was heretofore finally decided, that the District Court had no power to consider the additional testimony offered at the second trial, and, even if the case were originally disposed of under state law rather than federal law, as petitioner argued, state law is not different from federal law on the matter in dispute and was "absorbed as federal law" under the doctrine of *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957).

As to the *Alexander* action, the Court of Appeals also held that the new testimony should not be considered, in view of the Court's prior ruling on the issue of petition-

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the Court of Appeals show that petitioner's employees who sue in *Alexander*, along with the employees in *Zdanok*, actually brought identical actions against petitioner in 1958 in the Supreme Court of New York. Although petitioner removed the *Zdanok* action to the District Court, on diversity grounds, it failed to do so in *Alexander*, which, as the Court of Appeals points out, "remained quiescent" while *Zdanok* was being "prosecuted by Glidden with the utmost vigor." Upon the disposition of the *Zdanok* action by this Court, and because of petitioner's refusal to remove the pending state court action involving the great majority of petitioner's employees, the *Alexander* action, identical to *Zdanok*, was filed in their behalf in the District Court, and the state court action was discontinued. Throughout every step of the extended proceedings, as the Court of Appeals emphasizes, the *Zdanok* action was treated by the parties and the courts as the test case for the *Alexander* plaintiffs.

er's liability in *Zdanok* under the collective bargaining agreement here involved, declaring (App., pp. A-31, A-32):

> "We meant our previous ruling to be final on the hotly contested issue of liability under Glidden's contract with its employees, the Supreme Court affirmed this, and we have now affirmed it again."

Taking cognizance of the fact that "Glidden's opportunity to litigate the *Zdanok* case was both full and fair" and that the "*Zdanok* litigation was prosecuted by Glidden with the utmost vigor," with full knowledge of the pendency of the *Alexander* action, the Court found no basis for permitting the same issues finally and conclusively resolved against petitioner after extensive proceedings in *Zdanok* to be litigated *de novo* in *Alexander* (App. pp. A-33, A-34).

Argument

The long history of this "much litigated" case,[2] in which a wide variety of legal questions has already undergone searching judicial scrutiny, of itself seems to contradict any claim that important new federal questions have arisen which now require settlement by this Court.[3]

Petitioner nevertheless argues for reconsideration of the case, claiming this is now a different case because, following the final decision on the issue of liability, law was declared and additional facts were adduced that call

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[2] See opinion below, App., p. A-15.

[3] An outline of the history of this case in the federal courts appears in footnote 1 of the opinion of the Court of Appeals. It may be additionally noted that in October 1957, prior to the proceedings outlined, respondents' union sought to arbitrate the issues with petitioner. On petitioner's motion, however, arbitration was stayed by the New York Supreme Court, on the ground that the issues were not embraced by the arbitration provisions of the collective bargaining agreement. The state court expressly left the parties to other available remedies. *Matter of Gen'l Warehousemen's Union*, 10 Misc. 2d 700 (Sup. Ct. Queens Co. 1958).

for the reversal of the result reached. The Court of Appeals, exploring this contention with care and at some length, has concluded that it is untenable.

(1)

On the matter of emerging new law, petitioner cites *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962) for the proposition, not contested by us, that federal law is applicable in construing the collective bargaining agreement, and petitioner asserts that the judgment construing the agreement in this case should be overturned because it rests on state law. We adopt the view of the Court of Appeals: even if it were assumed that New York law was applied in construing the agreement here involved (and this is by no means obvious), federal law and New York law are the same where a court is confronted with the problem of construing a collective bargaining agreement. Indeed, even if state law is applied, it "will be absorbed as federal law." *Textile Workers Union* v. *Lincoln Mills* 353 U. S. 448, 456-457 (1957).

Petitioner's argument that the decision below now creates a conflict with *Oddie* v. *Ross Gear & Tool Co., Inc.*, 305 F. 2d 143 (6th Cir. 1962), cert. den. 371 U. S. 941 (1962), because the first *Zdanok* decision was based on state law and "the conflict did not arise until the prior holding was adopted by the court below in the instant cases as federal substantive law" (Pet., pp. 8, 26 at fn. 17) is a strained and fallacious one. Certainly, the Court below in its second decision did not say that it was adopting its prior decision as federal law. Moreover, the first *Zdanok* decision was "absorbed" as and constituted federal law when that decision was rendered. See *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 186 (2d Cir. 1962); *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52, 58-59 at fn. 4 (2d Cir. 1963), aff'd 84 S. Ct. 909 (1964). It did not become federal substantive law by "adoption" under the second decision of the Court of Appeals. Thus, if any conflict among the cir-

cuits can be thought to exist,[4] it would not exist by reason of the decision of the Court below.

The other federal decisions mainly relied on by petitioner as constituting governing law, are, as the Court of Appeals states, distinguishable. The same cases were repeatedly cited and relied on by petitioner—even before *Smith* v. *Evening News Ass'n* was decided—on the first appeal to the Court of Appeals (Brief, pp. 21-23), on the first petition for certiorari (Petition, pp. 14-16), on the petition for rehearing of the denial of certiorari (Petition, pp. 5-6), and on the second appeal to the Court of Appeals (Brief, pp. 23-25). Because the authorities cited by petitioner were not accepted by the courts as decisive of the case at bar, it does not follow that they were rejected because of their federal source, or that state law was being applied. Certainly, the Court of Appeals did not declare this to be so and it has now stated expressly that those authorities are distinguishable from the case at bar. At no stage did we argue that petitioner's authorities were inapplicable because their origin was federal law; at every step we pointed out the clear factual differences between those decisions and the instant case (Brief on first appeal to Court of Appeals, pp. 20-22; Brief in opposition to first petition for certiorari, pp. 12-14; Brief on second appeal to Court of Appeals, pp. 9, 19-21).

In reality, therefore, *Smith* v. *Evening News Ass'n* has added nothing to the substance of petitioner's argument, and its present claim based on that decision is lacking in merit. Petitioner's argument does not pose an im-

[4] In *Oddie* the Sixth Circuit pointed out that "the agreement in the *Glidden Company* case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case" (305 F. 2d at 149). And, in *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 at 58-59 at fn. 4 (2d Cir. 1963), aff'd 84 S. Ct. 909 (1964), the Court below described *Oddie* as one which "recognize[d] that the matter is solely one of the 'construction of the agreement'".

portant federal question requiring settlement by this Court.

(2)

Petitioner also argues that its additional testimony at the second trial compels a result different from that previously reached.[5] This contention (passing for the moment the question whether, against the history of this case, the additional testimony can properly be considered) is directed solely to the construction of the particular agreement here involved. Considering the "great variations" existing among seniority provisions of collective bargaining agreements (*Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U. S. 521, 526 [1949]), petitioner's contention respecting the construction of the agreement at bar would not seem to raise an important question of federal law which should be settled by this Court.

(3)

The Court of Appeals has held, however, that the new testimony cannot be considered either in *Zdanok* or in *Alexander*, because its previous decision was final and binding on the issue of petitioner's liability under this collective bargaining agreement. Does this holding by the Court of Appeals as to the law of the case present an important question of federal law which should be settled by the Supreme Court?

As to *Zdanok*, the correctness of this holding would seem to be so plain as to require no extended discussion. That case had been tried on the issue of liability; the parties rested, and the record was closed; a final decision after trial and after appeal was rendered. Against this background we suggest it would be unthinkable to allow petitioner to offer additional evidence at a second trial

[5] We note that the Court below did not regard the additional evidence as "truly convincing" or "probative" (App., pp. A-28, A-29).

as if all of the prior proceedings had been futile. Such a course would render the litigation—already protracted—interminable.

As to *Alexander*, and as the Court below states, ever since 1958 the parties and the courts at every stage of the litigation had been proceeding on the basis that the issue of petitioner's liability under this collective bargaining agreement was being resolved for all purposes. Indeed, the Court of Appeals declares that this was its intent in deciding *Zdanok*: "We meant our previous ruling to be final on the hotly contested issue of liability under Glidden's contract with its employees * * * ". —binding upon petitioner not only as to the five employees in *Zdanok*, but as to all employees suing petitioner who occupied identical positions (App., pp. A-31, A-32). The agreement was the same for all; the identity of the issue of liability was the same for all. As the Court below shows in an extensive discussion, the application of the law of the case doctrine to *Alexander* in the circumstances here involved is not novel; the need of mutuality of estoppels "has been much eroded in recent years" (App., p. A-30). See *Bruszewski* v. *United States*, 181 F. 2d 419 (3rd Cir. 1950), cert. den. 340 U. S. 865 (1950); *Adriaanse* v. *United States*, 184 F. 2d 968 (2d Cir. 1950), cert. den. 340 U. S. 932 (1951).

Petitioner assuredly had sufficient opportunity to litigate the issue of its liability in *Zdanok* and it did so "diligently" and "with the utmost vigor" (App., p. A-34). The decision of the Court of Appeals holding petitioner to the decision previously rendered against it is in these circumstances scarcely unwarranted. All of the judges below were of this view. The asserted conflict between the decision below and other cases cited by petitioner, in the circumstances here involved, is more imagined than real. The decision, we submit, does not pose an important question of federal law which requires settlement by this Court.

Finally, in response to petitioner's statement that "the estoppel issue was never raised, briefed or argued in the courts below" (Pet., p. 21), we would state that this question was raised by respondents in the District Court and in the Court of Appeals. The opinion of the District Court, in essence, rests on this point. (App., p. A-8). And, in the Court of Appeals, we stated at the outset of our argument in our brief (at p. 7):

> "We view this decision [of the Court of Appeals in *Zdanok*, 288 F. 2d 99] as completely resolving the issue of liability against this defendant in *Zdanok*, and as binding and controlling upon the same defendant in the identical *Alexander* action, which involves the same agreement and is based on the same facts."

In view of this background in the District Court and in the Court of Appeals, petitioner cannot reasonably be heard to argue that it is entitled at this time to an opportunity to argue this question in this Court.

CONCLUSION

For the foregoing reasons this petition for writs of certiorari should be denied.

May 4th, 1964.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1049.

[CONSOLIDATED ACTIONS]

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

OLGA ZDANOK, *et al.*, *Respondents.*

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, *Petitioner,*

vs.

FRANK T. ALEXANDER, *et al.*, *Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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I. The *Zdanok* Case.

Respondents make no serious effort to contest the proposition that the Court of Appeals' *Zdanok* decision stands in direct conflict with that of the Sixth Circuit in *Oddie* v. *Ross Gear & Tool Co., Inc.*, 305 F. 2d 143 (6th Cir. 1962), *cert. denied*, 371 U. S. 941 (1962).

It must be emphasized, however, that this conflict did not arise until the first *Zdanok* decision was reconsidered by the Court of Appeals on the second appeal and adopted as federal substantive law.[1]

Respondents' statement that "the first *Zdanok* decision was 'absorbed' as and constituted federal law when that decision was rendered" (Brief in Opp. page 5) is a contradiction in terms and, needless to say, has no basis whatsoever in the decision of the Court of Appeals. It is indeed an exercise in temerity for respondents to make such a claim when both this Court (370 U. S. at 537) and the Court of Appeals (App. page A-23) accepted the prior *Zdanok* decision as one resting on New York contract law rather than applicable federal law. It was on the second *Zdanok* appeal that the Court of Appeals, recognizing its obligation to construe this bargaining agreement as a matter of federal law under this Court's intervening decision in *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962), reconsidered and adopted the prior decision as federal law.

II. The *Alexander* Case.

The principal thrust of respondents' argument in opposition to the petition in *Alexander* is that the Court of Appeals' newly fashioned principles of collateral estoppel present no "novel" or important questions of federal law (Brief in Opp. page 8). Here again, however, respondents refuse to discuss the conflicts created by the decision of the Court of Appeals and simply ignore the tortured process followed by the Court of Appeals to decision in this case.

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[1] As noted before (Pet. page 9), this is why Judge Friendly took care to point out that "the Supreme Court's expressed belief that our ruling rested on state law [a proposition accepted by the Court of Appeals on the second *Zdanok* appeal] deprives the denial of certiorari in *Oddie* of whatever small significance it might otherwise have had." (App. page A-25).

Until the decision of the Court of Appeals in *Alexander* neither this Court nor any Court of Appeals had ever sanctioned, as a matter of federal law, offensive use of a judgment by a stranger to that judgment in a subsequent action against a common defendant. See, e.g., *Keokuk & Western Ry. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894); *Bird* v. *United States*, 241 F. 2d 516 (1st Cir. 1957) and cases cited in the Petitions at pages 17-18. Respondents' attempt to justify the Court of Appeals' departure[2] from this rule on the ground that *Zdanok* was for some unexplained reason a "test case" for the "quiescent" *Alexander* action (Brief in Opp. pp. 3, 8) is without any support in the record of either one of these cases. To resolve this question the Court need look no further than the fact that plaintiffs were being accumulated for and added to the *Alexander* case right up until and after the trial of the case in the district court in 1963. (U. S. D. C. R. pages 776, 1014, 1150).[3]

The havoc the decision of the Court of Appeals will create in enforcement of collective bargaining agreements, some of which cover thousands of employees, each now having individual and enforceable rights against their employer under this Court's *Smith* decision, has already been called to this Court's attention. (Pet. page 20).

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[2] Based upon authorities (also relied upon here by respondents) adhering to the long established rule noted by the same Court of Appeals in *Adriaanse* v. *United States*, 184 F. 2d 968 (2d Cir. 1950), cert. denied, 340 U. S. 932 (1951), but departed from here by the Court of Appeals.

[3] This activity does not comport with the notion adopted by respondents and the Court of Appeals that the *Alexander* case was being held in abeyance pending final disposition of *Zdanok*. It does serve to demonstrate, however, the bandwagon psychology petitioner maintains has been created by the Court of Appeals' abandonment of the mutuality rule. (Pet. page 20). Some of the respondents here, who are now in a position to collect damages against petitioner, were really strangers to *both* actions until shortly before the decision of the Court of Appeals.

Respondents' efforts to explain away the conflicts created by this decision and its consequences as "more imagined than real" (Brief in Opp. page 8) are belied by the facts of their own case.

The second area of conflict created by the decision of the Court of Appeals in *Alexander* resulted from that court's failure to recognize, as this Court and other Courts of Appeals have repeatedly held, that an intervening change of law renders collateral estoppel inapplicable as a matter of federal law. See, e.g., *Commissioner* v. *Sunnen*, 33 U. S. 591 (1948); *Blair* v. *Commissioner*, 300 U. S. 5 (1937); *Parker* v. *Westover*, 221 F. 2d 603 (9th Cir. 1955) and cases cited in Petition pages 23-24. The respondents' refusal to even mention these cases is apparently based on the assumption that further discussion of the decisions will only further demonstrate and sharpen the conflicts created by the unprecedented decision of the Court of Appeals.

Respondents also fail to meet the most anomalous aspect of the *Alexander* case, i.e., that petitioner has been held estopped in this case on the basis of a decision admitted by the Court of Appeals to rest on state law when, under this Court's intervening *Smith* decision, it was entitled to full consideration of its liability as a matter of federal law.[4] The fact that the first *Zdanok* decision was adopted as federal law on the second appeal is immaterial since the

[4] This may explain why respondents maintain in their discussion of the *Zdanok* case that "the first *Zdanok* decision was 'absorbed' as and constituted federal law when that decision was rendered." (Brief in Opp. page 5). This statement, which attributes more error to the decision of the Court of Appeals than even petitioner is willing to assert, hardly deserves any more comment than has already been made. See Part I, *supra*, pages 1 and 2.

estoppel could arise only by virtue of the first *Zdanok* decision.

Nor can it be said that since the first decision has now been adopted as federal law by the Court of Appeals, this problem is one of form rather than substance. The Court of Appeals, by working within the "law of the case" framework of *Zdanok* in its review of the separate *Alexander* action, failed to consider the full range of national labor policies required in this case by *Smith*. By erroneously committing itself to a "clear error" standard of review (App. pages A-27-28), the court necessarily precluded consideration of petitioner's liability in the manner directed by this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). In short, there can be no better illustration of the necessity for the intervening change of law rule than *Alexander*, where the Court of Appeals' self-imposed limitation on review resulted in a complete frustration of the decision-making processes called for by this Court in *Lincoln Mills* and required in this case by the intervening *Smith* decision.

III. Conclusion.

Rarely have so many clearly established conflicts in so many important areas of the law arisen as in this litigation. Contrary to respondents' suggestions (brief in opp.—page 4), the protracted nature of this litigation has served to increase rather than diminish the importance and number of the federal questions now before this Court. Respondents' refusal to discuss the conflicts which exist in these areas does not lessen the necessity for their resolution in these cases.

For the foregoing reasons and those set forth in the petitions for writs of certiorari, petitioner respectfully submits that the petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated May 11, 1964

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